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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PHILLIPS PETROLEUM COMPANY,
Petitioner,

v.

IRL SHUTTS and ROBERT ANDERSON and BETTY ANDERSON, individually and as representatives of all producers and royalty owners to whom Phillips Petroleum Company made payment of suspended proceeds of royalties pursuant to Federal Power Commission Opinion Nos. 699, 699H, 749, 749C, 770 and 770A,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS AND PETITION FOR WRIT OF MANDAMUS

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QUESTIONS PRESENTED

1. Did the Kansas Supreme Court's failure on remand from *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), to honor this Court's conclusion that conflicts of laws existed between Kansas law and the law of more interested states violate this Court's mandate?

2. Did the Kansas Supreme Court err in creating federal common law to control the relationship between gas producers or purchasers and royalty owners when the applicable federal statutes and regulations show absolutely no basis for doing so?

3. Did the Kansas Supreme Court's failure to exercise good faith in determining and applying the laws of interested states to transactions governed by those states' laws violate the mandate of this Court and Phillips Petroleum Company's rights secured by the Due Process and Full Faith and Credit Clauses?

4. Did the Kansas Supreme Court's utilization of a federal regulation in a manner never intended by Congress or the regulatory agency that promulgated it, producing an adverse impact on interstate natural gas pricing, violate the Supremacy Clause of Article VI of the United States Constitution?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
I. The Actions Of The Kansas Supreme Court Were Directly Inconsistent With This Court's Mandate	6
II. Creating Federal Common Law To Hold Phillips Liable For Prejudgment Interest At The "FERC Rates" Was An Inappropriate Exercise Of Judicial Power And Was Contrary To Federal Law	8
III. The Court Below Violated Principles Of Due Process And Full Faith And Credit By Failing To Give Effect To The Controlling Law Of Other States	15
IV. The Kansas Court's Utilization Of A Federal Regulation In A Manner Patently Unintended By Congress Or The Regulatory Agency That Promulgated It, Producing An Adverse Impact On Interstate Natural Gas Pricing, Violated The Supremacy Clause	21
CONCLUSION	23

TABLE OF AUTHORITIES

Cases: Page

Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981) 19
Amoco Production Co. v. Hardy, 628 S.W.2d 813 (Tex. 1981) 20
Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981) 13, 14, 22
Matter of Bybee, 236 Kan. 443, 691 P.2d 37 (1984) .. 19
El Paso Natural Gas Co. v. Sun Oil Co., 708 F.2d 1011 (5th Cir. 1983), *cert. denied*, 468 U.S. 1219 (1984) 11
FERC v. Triton Oil & Gas Corp., 750 F.2d 113 (D.C. Cir. 1984) 14
Fidelity Federal Savings & Loan Association v. de la Cuesta, 458 U.S. 141 (1982) 21
Freeman v. Hewit, 329 U.S. 249 (1946) 15
Gigot v. Cities Service Oil Co., 241 Kan. 304, 737 P.2d 18 (1987) 20
Gray v. Amoco Production Co., 1 Kan. App.2d 388, 564 P.2d 579 (1977), *modified*, 223 Kan. 441 (1978) 20
Haas v. Freeman, 236 Kan. 677, 693 P.2d 1199 (1985) 19
Helmley v. Ashland Oil, Inc., 1 Kan. App.2d 532, 571 P.2d 345 (1977) 20
Hines v. Davidowitz, 312 U.S. 52 (1941) 21
Lightcap v. Mobil Oil Corp., 221 Kan. 448, 562 P.2d 1, *cert. denied*, 434 U.S. 876 (1977) 11
Maddox v. Gulf Oil Corporation, 222 Kan. 733, 567 P.2d 1326 (1977), *cert. denied*, 434 U.S. 1065 (1978) 20
Maryland v. Louisiana, 451 U.S. 725 (1981) 22
Matzen v. Cities Service Oil Co., 233 Kan. 846, 667 P.2d 337 (1983) 20
McLeod v. J. E. Dilworth Co., 322 U.S. 327 (1944) .. 15
Milwaukee v. Illinois, 451 U.S. 304 (1981) 12
Mobil Oil Corp. v. FPC, 463 F.2d 256 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 976 (1972) 10
Nix v. Northern Natural Gas Producing Co., 222 Kan. 739, 567 P.2d 1322 (1977), *cert. denied*, 434 U.S. 1067 (1978) 20

TABLE OF AUTHORITIES—Continued

Page

Northern Natural Gas Co. v. State Corporation Commission, 372 U.S. 84 (1963) 21, 22
Pennzoil Co. v. FERC, 645 F.2d 360 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982) 12, 13
Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) ..... *passim*
Phillips Petroleum Co. v. Stahl Petroleum Co., 569 S.W.2d 480 (Tex. 1978) 12
Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954) 10
In Re Sanford Fork & Tool Co., 160 U.S. 247 (1895) 8
Shutts v. Phillips Petroleum Co., 240 Kan. 764, 732 P.2d 1286 (1987) ..... *passim*
Shutts, Executor v. Phillips Petroleum Co., 222 Kan. 527, 567 P.2d 1292 (1977), *cert. denied*, 434 U.S. 1068 (1978) 7, 20
Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) 21
Sterling v. Superior Oil Co., 222 Kan. 737, 567 P.2d 1325 (1977), *cert. denied*, 434 U.S. 1067 (1978) 20
Texas Industries v. Radcliff Materials, 451 U.S. 630 (1981) 12
Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board of Mississippi, 474 U.S. 409 (1986) 13
United Gas Improvement Co. v. Continental Oil Co., 381 U.S. 392 (1965) 10
United Gas Pipe Line Co. v. FERC, 657 F.2d 790 (5th Cir. 1981) 11
United States v. Fossatt, 62 U.S. (21 How.) 445 (1859) 8
Vendo Co. v. Lektro-Vend Corp., 434 U.S. 424 (1978) 8
Whitehall v. Boagni, 255 La. 67, 229 So.2d 702 (1969) 17
World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) 19

TABLE OF AUTHORITIES—Continued

Page

Wortman v. Sun Oil Co., 236 Kan. 266, 690 P.2d 385 (1984), *vacated*, —— U.S. ——, 88 L.Ed.2d 33 (1985) 20

Other Authorities:

18 C.F.R. § 154.102 ..... *passim*
91 Stat. 578 3
5 U.S.C. § 553 14
15 U.S.C. § 717c 9, 10
28 U.S.C. § 1257(3) 2
28 U.S.C. § 1651 2
FERC Order No. 273, 48 Fed. Reg. 1279 (1983) 10
FERC Order No. 399, 49 Fed. Reg. 37735 (1984) 11
FERC Order, *Camedan Oil Corp.*, No. GP 85-47-000 (May 7, 1987), N.G.P.A. Info. Serv. (Fed. Program Advisory Serv.), ¶ 5,949-660 11
Kan. Stat. Ann. § 16-204 (1974) 18
J.E. Kennedy, *The Supreme Court Meets The Bride Of Frankenstein: Phillips Petroleum Co. v. Shutts And The State Multistate Class Action*, 34 Kan. L. Rev. 255 (1985) 21
Note, *State Court Evasion of United States Supreme Court Mandates*, 56 Yale L.J. 574 (1947) 8
Okla. Stat. tit. 23, § 8 17
United States Constitution Article IV, § 1 2
United States Constitution Article VI 2
United States Constitution Fourteenth Amendment 3

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IRL SHUTTS and ROBERT ANDERSON and BETTY ANDERSON, individually and as representatives of all producers and royalty owners to whom Phillips Petroleum Company made payment of suspended proceeds of royalties pursuant to Federal Power Commission Opinion Nos. 699, 699H, 749, 749C, 770 and 770A,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS AND PETITION FOR WRIT OF MANDAMUS

Petitioner Phillips Petroleum Company (Phillips)[1] prays that a writ of mandamus issue on questions one and three directing the Supreme Court of Kansas to comply with the mandate of this Court issued following the decision of *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). In the alternative, Phillips requests this Court to consider all questions as a petition for certiorari to review the opinion and judgment of the Supreme Court of Kansas entered in *Shutts v. Phillips Petroleum Co.*, 240 Kan. 764, 732 P.2d 1286 (1987).

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[1] Petitioner's statement pursuant to Supreme Court Rule 28.1 is set forth in the Appendix at page 175a.

OPINIONS BELOW

The opinion of the Supreme Court of Kansas (240 Kan. 764, 732 P.2d 1286) is set forth in the Appendix at page 1a. The opinion of the district court on remand is set forth in the Appendix at page 54a. The opinion of this Court (472 U.S. 797) is set forth in the Appendix at page 60a. The first opinion of the Kansas Supreme Court (235 Kan. 195, 679 P.2d 1159) is set forth at page 111a, and the first opinion of the district court is set forth at page 155a.

JURISDICTION

The Supreme Court of Kansas entered its opinion February 25, 1987. Phillips' motion for rehearing was denied by that court on May 11, 1987. App. 53a. Phillips applied for an extension of time to file this petition, and Justice White, on July 31, 1987, granted petitioner until August 28, 1987, in which to file this petition. This Court's jurisdiction is invoked under 28 U.S.C. § 1651 and § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Article IV, § 1 of the United States Constitution provides in pertinent part:

> Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state.

Article VI of the United States Constitution provides in pertinent part:

> This constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall any state deprive any person of life, liberty or property, without due process of law.

STATEMENT OF THE CASE

Petitioner Phillips, a Delaware corporation with its principal place of business in Oklahoma, produced or purchased natural gas from numerous oil and gas leases covering lands located in 12 states. Phillips paid producers and made its royalty payments on the basis of a percentage of the monies received by Phillips when it sold some of this (and other) gas to pipeline companies for transportation and resale in interstate commerce at prices regulated by the Federal Power Commission (the Commission).[2]

Phillips was required to obtain Commission approval of price increases for gas sales, but was permitted to collect the higher prices pending final approval after undertaking to refund to the purchasing pipeline companies any part of the price increases not approved by the Commission. While Commission approval of price increases was pending, Phillips made royalty payments based on rates previously approved by the Commission. Phillips paid *additional* royalties to royalty owners by making calculations based on the finally approved prices after resolution of court challenges to Commission Opinions Nos. 699, 749 and 770.

In this Kansas state court class action, three named royalty owners, for themselves and on behalf of a class of over 28,000 royalty owners, seek to recover *interest* on the additional royalties Phillips paid.[3] One of the

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[2] The responsibilities of the Federal Power Commission (FPC) were transferred to the Federal Energy Regulatory Commission (FERC) in 1977. See 91 Stat. 578, 582-84. Phillips will refer to both the FPC and the FERC as the Commission.

[3] The issue here was not one of additional royalties that were *never* paid, or royalties that were *untimely* paid; the action concerns only whether interest should have been paid on the additional royalties.

named class representatives, Irl Shutts, is a resident of Kansas; the other two are residents of Oklahoma. They represent a class composed of residents of every state.

On March 24, 1984, the Kansas Supreme Court affirmed a decision of the District Court of Seward County, Kansas that held Phillips liable under Kansas law to all class members having no contact with the forum and required payments to all class members of interest at rates established in federal regulations by the Commission for refunds to pipeline purchasers. App. 148a-149a. The court held that the interest liability was based on Kansas equitable principles. Phillips petitioned this Court for a writ of certiorari.

On October 9, 1984, this Court granted certiorari in *Phillips Petroleum Co. v. Shutts*, 469 U.S. 879, to address two questions: (1) Whether a state court in a class action could exercise jurisdiction over unnamed nonresident class members with no contacts with the forum state to adjudicate claims unrelated to that state; and (2) whether a state court in a nationwide class action consistent with the Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause of Article IV of the United States Constitution could apply its own laws controlling liability for interest and interest rates to transactions between nonresidents that occur in other states and to which the forum has no connection.

This Court determined that a state court could exercise jurisdiction over unnamed nonresident plaintiff class members if certain procedural protections were provided, but this Court reversed the Kansas Supreme Court's application of Kansas law to all transactions involved in this case. Finding that Kansas constitutionally could not apply its own laws to each transaction, this Court reversed the judgment of the Kansas Supreme Court and remanded the suit to that court "for further proceedings not inconsistent with this opinion." App. 84a.

The Kansas Supreme Court, in turn, remanded the case to the Seward County District Court for proceedings not inconsistent with this Court's opinion. The district court issued a decision that "affirmed" the judgment that this Court had reversed. App. 59a. That decision again was appealed to the Kansas Supreme Court. In reviewing the district court decision, the Kansas Supreme Court purported to examine the law of the five other states having direct connections with most of the transactions involved in this lawsuit. That court evaded the mandate of this Court by ignoring the conflicts previously recognized by this Court and by misconstruing the laws of the other interested states. It extended a wholly inapposite federal regulation by applying it to the relationship between a royalty owner and a producer or purchaser and did so at the expense of interested states' law. The effect of these actions was to create federal common law, identical to Kansas law, which the Kansas court applied as the law of each of the interested states.

In holding Phillips liable for interest, the Kansas Supreme Court utilized the interest rates established by a federal regulation, 18 C.F.R. § 154.102, which prescribes interest liability and the rates imposed upon a seller of gas when that seller must refund interim rates to a pipeline purchaser that are held to be unjustified.[4] The Kansas Supreme Court created federal common law by extending this regulation to apply to amounts paid to royalty owners as additional royalties after Commission approval of higher gas prices. That court held Phillips liable to royalty owners for interest at the rates specified in the regulation.

A writ of mandamus should issue to direct the Kansas Supreme Court to execute this Court's prior mandate. In the alternative, this Court should grant certiorari to

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[4] The text of 18 C.F.R. § 154.102 appears in the Appendix at page 165a.

invalidate the Kansas Supreme Court's misguided creation of federal common law and to determine that Phillips' constitutional rights have been violated once again.

REASONS FOR GRANTING THE WRIT

I. The Actions Of The Kansas Supreme Court Were Directly Inconsistent With This Court's Mandate.

In *Phillips Petroleum Co. v. Shutts, supra,* this Court recognized that, as a prerequisite to reaching the constitutional issue created by the application of Kansas law to all transactions in this case, it first had to determine if the chosen Kansas law conflicted in any material way with any other law that could apply. This Court recognized that there could be no injury in the application of Kansas law if it did not conflict with the law of any other jurisdiction connected to this suit. App. 79a. This Court addressed the laws of the other interested states and found that Kansas law varied in significant ways from the laws of Oklahoma, Texas and Louisiana. This Court specifically discussed the different interest rates that were applicable under Kansas, Texas and Oklahoma law and also cited an Oklahoma statute that, unlike Kansas law, excuses liability for interest if a creditor accepts payment of the full principal. After reviewing these differences, and others, this Court stated that:

> Given Kansas' lack of "interest" in claims unrelated to that State, *and the substantive conflict with jurisdictions such as Texas,* we conclude that application of Kansas law to every claim in this case is sufficiently arbitrary and unfair as to exceed constitutional limits.

App. 84a-85a (emphasis added).[5]

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[5] Justice Stevens was the lone dissenter from this Court's determination that the application of Kansas law resulted in the deprivation of Phillips' constitutional rights, concluding that the

This Court specifically discussed an earlier, but similar, lawsuit between some of the same parties, *Shutts, Executor v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292 (1977), *cert. denied*, 434 U.S. 1068 (1978). In discussing that case, and the conflicts between the interest rates applied by the Kansas court and those applied by the Texas courts, this Court stated that "in finding the 6% Texas rate inapplicable, [the Kansas Supreme Court] *cited but did not follow contrary Texas precedent.*" App. 85a, n.8 (emphasis added).

On remand, the Kansas Supreme Court found that no Texas court ever had mentioned the higher rates set by federal regulations and noted that Texas statutes provide for an interest rate of no more than six or ten percent. App. 19a. Inexplicably, however, the Kansas Supreme Court applied the higher federal rates to determine the prejudgment interest arising on the Texas obligations. This holding directly conflicted with this Court's decision. Once again the Kansas Supreme Court cited but did not follow contrary Texas precedent.

The Kansas Supreme Court had a duty to act consistently with this Court's determination that conflicts of laws existed. It was required to give effect to those conflicts recognized by this Court and to apply the law of the other states. The Kansas Supreme Court did not do that. Instead, that court circumvented this Court's mandate by distorting the law of each of the interested states and reaching a preordained conclusion, contrary to this Court's decision, that those states' laws were identical to that of Kansas. The state court overstepped its constitutional authority in revising and evading what this Court had determined.

Court should have found no constitutionally significant conflict. This dissent dispels all doubt that the majority's holding that the conflict between the other states' laws and the Kansas law was central to this Court's determination that a constitutional violation had occurred.

Mandamus is available to a party who has prevailed in this Court if a lower court "does not proceed to execute the mandate, or disobeys and mistakes its meaning . . . ." *United States v. Fossatt*, 62 U.S. (21 How.) 445, 446 (1859). This Court in *Phillips Petroleum Co. v. Shutts* determined that conflicts existed between Kansas and other states' laws. That determination, a *necessary prerequisite* for the constitutional question resolved by this Court in its previous review of this class action, must be "considered as finally settled." *In Re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895). Failure to give effect to this Court's opinion justifies issuance of a writ of mandamus. *Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 424 (1978).

The Kansas court's disobedience to this Court's mandate contributes

> discredit to the country's judicial system. The layman expects that an adjudication of a party's rights by the United States Supreme Court is determinative; and loss of respect follows naturally if its mandates are evaded or if litigation is again prolonged.

Note, *State Court Evasion of United States Supreme Court Mandates*, 56 Yale L.J. 574, 580 (1947). A writ of mandamus should issue to the Kansas Supreme Court.

II. Creating Federal Common Law To Hold Phillips Liable For Prejudgment Interest At The "FERC Rates" Was An Inappropriate Exercise Of Judicial Power And Was Contrary To Federal Law.

The court below determined that the outcome under the laws of five independent states would be identical to results reached under Kansas law. It did so by treating issues as if they were governed by a wholly inapposite federal regulation, 18 C.F.R. § 154.102. The Kansas court held that this regulation: (1) invalidated contract clauses, App. 14a-16a, 26a; (2) constituted the basis for

an agreement that set interest rates, App. 27a; (3) gave rise to a third-party beneficiary relationship in the royalty owners' favor, App. 37a; and (4) would be looked to by all the states involved in this action as the final word on the applicable rate of interest, App. 50a. In the Kansas Supreme Court's view, the additional royalties "originated in federal law and are thoroughly permeated with interest fixed by federal law in the [Commission] regulations . . . ." *Id.*

Through its repeated use of this federal regulation to overcome obstacles posed by otherwise applicable state law that differed from Kansas law, Kansas created a far-reaching penumbra of new federal common law surrounding this regulation. This new common law of interest liability never was intended by Congress or the Commission and is not consistent with the regulation relied on or the underlying statute. Kansas' creation of this law not only invades the domain reserved to Congress by the Commerce Clause to deal with matters such as these, if it chooses to do so, but it intrudes on the freedom of other, more interested, states to apply their own substantive law to a wide range of oil and gas transactions. Certiorari should be granted so that this Court, which is the only forum available, can correct the errors stemming from the Kansas Supreme Court's adventure into establishing a federal common law governing the relationship between gas producers and royalty owners regarding interest.

The interest rates established by 18 C.F.R. § 154.102 (the FERC rates) relied upon by the Kansas court have a single, limited purpose. They explicitly apply only to interest paid by sellers to pipelines on rates that are collected subject to refund and are later determined to be unlawful under Section 4(a) of the Natural Gas Act, 15 U.S.C. § 717c(a) (NGA). The FERC rates, which presently are tied to prime interest rates, are imposed pursuant to the NGA, which requires that amounts collected

from a pipeline pending approval be refunded "with interest" if found to be "not justified." 15 U.S.C. § 717c (e).[6]

The Kansas court's extension of the federal regulation promulgated under authority of the NGA to transactions with royalty owners is not consistent with the Act. This Court has indicated that the NGA was intended to provide "[p]rotection of consumers against exploitation at the hands of natural-gas companies," *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 685 (1954), while "in no way interfering with state regulatory power over the physical production or gathering in furtherance of conservation or other legitimate state concerns." *United Gas Improvement Co. v. Continental Oil Co.*, 381 U.S. 392, 403 (1965).

Prior to the Kansas court's decision, courts and the Commission uniformly have held royalty obligations to be beyond the reach of the NGA. See, *e.g.*, *Mobil Oil Corp. v. FPC*, 463 F.2d 256 (D.C. Cir. 1971), *cert. de-*

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[6] At the time of the interim collections involved in this case, gas sellers were obligated, prior to collecting higher rates, to file a corporate undertaking securing payment of refunds. This requirement arose from the Commission's authority to require a bond under Section 4(e) of the NGA. This requirement was eliminated in 1983 by FERC Order No. 273, 48 Fed. Reg. 1279.

Phillips filed the required undertaking and agreed to comply with regulations promulgated under the NGA concerning refunding, reporting and record-keeping of interim rate collections. See App. 169a. This limited undertaking by Phillips was (1) to pay interest to gas purchasers, not royalty owners; and (2) to apply only to gas sales receipts held to be unjustified and refunded to purchasers. The corporate undertaking imposed no obligation on Phillips to pay interest to royalty owners at *any* rate. Despite this, the Kansas Supreme Court relied upon this undertaking. Its decision transformed Phillips' undertaking from a federally mandated promise to pay interest on refunds to pipeline purchasers into a federally mandated promise to pay interest to royalty owners on monies that never were refunded. No other court in the nation previously has recognized such third-party beneficiary rights. This is not surprising, for such a theory is contrary to the plain language of the regulation.

nied, 406 U.S. 976 (1972); *El Paso Natural Gas Co. v. Sun Oil Co.*, 708 F.2d 1011, 1016 (5th Cir. 1983), *cert. denied*, 468 U.S. 1219 (1984) ("lease transfers and the royalties collected thereunder are generally within the 'production or gathering' exception of the Act, 15 U.S.C.A. § 717(b), and thus not jurisdictional").[7] *See also* FERC Order No. 399, 49 Fed. Reg. 37735 (Sept. 20, 1984) ("the Commission does not have jurisdiction over royalty interest owners"); FERC Order *Camedan Oil Corp.*, No. GP85-47-000 (May 7, 1987), N.G.P.A. Info. Serv. (Fed. Program Advisory Serv.), ¶ 5,999-660 ("we hold that the transaction between the royalty owner and the producer is not a sale of natural gas and accordingly is not a first sale subject to the NGPA's Title I ceiling prices").

It is not surprising that the FERC requirement of interest previously has been viewed as having only a narrow application. See *United Gas Pipe Line Co. v. FERC*, 657 F.2d 790, 796 (5th Cir. 1981) ("interest can be required only when it is determined [by the Commission] that the money belongs to the consumers"). This Court's prior opinion noted these limits: "No federal statutes touched on the liability for suspended royalties . . . ." App. 63a.

Notwithstanding this substantial body of law, the Kansas court inexplicably extended the reach of the federal regulation, and thus the scope of the NGA, to govern an aspect of the relationship between royalty owners and gas producers or purchasers. Creation of this federal common law did not forward any federal interests. Congress excepted matters pertaining to royalties and other

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[7] The Kansas Supreme Court itself recognized this limitation of the scope of the NGA in *Lightcap v. Mobil Oil Corp.*, 221 Kan. 448, 562 P.2d 1, *cert. denied*, 434 U.S. 876 (1977) ("the FPC has no jurisdiction over a royalty owner or over a dispute between a royalty owner and his producer as to the amount of royalties payable under a gas lease").

issues inherent in the production of gas from federal regulation. Since Congress has concluded that regulating the relationship between royalty owners and producers or purchasers should be left to the states, questions concerning that relationship cannot "implicate 'uniquely federal interests' of the kind that oblige courts to formulate federal common law." *Texas Industries v. Radcliff Materials*, 451 U.S. 630, 642 (1981). The imposition of a new, purportedly uniform federal common law rule by the Kansas Supreme Court defeats the congressional intent that states regulate this relationship.

Creation of federal common law to govern private activities in fields regulated by federal agencies is not favored. Because Congress divided power between a regulatory body and the states, it should be concluded that Congress "was the exclusive source of *federal* law." *Milwaukee v. Illinois*, 451 U.S. 304, 319 n.14 (1981) (emphasis in opinion). The Kansas court cannot be permitted to add a layer of court-imposed national regulation, especially when there is no federal disposition to do so and the relevant federal regulatory agency lacks any power to create such regulation. See *Pennzoil Co. v. FERC*, 645 F.2d 360, 385 (5th Cir. 1981) (the NGA does not require a federal common law of contracts).

Particularly offensive is that the Kansas court used the federal regulation to defeat a contractual provision to avoid interest liability that Texas has recognized as valid. In *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480, 484 (Tex. 1978), the Texas Supreme Court identified a contractual pricing provision that it indicated would result in no interest liability attaching. Thereafter, Phillips entered into contracts containing this type of "no interest" provision. It specified a purchase price for gas calculated first on the basis of approved filed rates. Then, when and if a new rate was approved, the contract provided for a recomputation of the purchase price for the period in which Phillips collected un-

approved rates and a payment of the recomputed price *without interest.*

The Kansas Supreme Court invalidated Phillips' "no interest" contract clauses, holding that such provisions were contrary to federal regulations. App. 16a. In reaching this conclusion the Kansas Supreme Court again misinterpreted federal law. In *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 582 (1981), this Court noted that "the Commission itself lacks affirmative authority, absent extraordinary circumstances, to 'abrogate existing contractual arrangements,' " and that "nothing in the [Natural Gas] Act *forbids* parties from setting their rates by contract." (emphasis in opinion). *See also Pennzoil Co. v. FERC*, 645 F.2d 360, 384-85 (5th Cir. 1981) ("the NGA did not abrogate the ability of the parties to privately contract within the regulatory confines of the Act").[8] The Kansas court's treatment of these contract clauses exceeded even the Commission's power over them. In passing upon the validity of these contractual provisions under the NGA, the court below "usurped a function that Congress has assigned to a federal regulatory body." *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. at 582. Consistent with federal statutes, Phillips had the right (1) to contract to pay additional royalties after appellate reviews of the new rates were final, and (2) to pay the additional royalties without interest. Creating federal common law to eliminate that right not only conflicted with what the Texas Supreme Court has held to be its law, but also served to frustrate federal interests and the statutory scheme created by Congress.[9]

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[8] Just as the federal legislation and regulation did not address the interpretation of gas purchase escalation provisions (the *Pennzoil* case), the NGA and Commission regulations do not address private contractual arrangements to pay additional royalties *without interest.*

[9] In *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board of Mississippi*, 474 U.S. 409, 88 L.Ed.2d 732 (1986), this

The Kansas court created federal common law that is inconsistent with the NGA and the plain language of 18 C.F.R. § 154.102. In light of the unambiguous language of the regulation, the Commission itself could not achieve the result reached by the Kansas court. *FERC v. Triton Oil & Gas Corp.*, 750 F.2d 113, 116 (D.C. Cir. 1984).[10] The Kansas court's repeated reliance on vague notions of overriding "equitable considerations" that ultimately only reflect its own parochial interest cannot support its holding. As this Court noted in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 584, "no appeal to equitable principles can justify this usurpation of federal authority."

The Kansas Supreme Court seems pathologically determined to maximize Phillips' liability despite various state laws that are not as Draconian or anti-gas producer or purchaser as Kansas law and contract pricing provisions that obviated any interest obligation. Its latest technique is simply to "FERC 'em." That court's repeated resort to the fabrication of federal law to solve its dilemma as to how to hold Phillips liable, notwithstanding this Court's mandate, poses a substantial misconstruction of federal law that only this Court can correct.[11]

Court invalidated a state regulation because that regulation was inconsistent with the perceived intent of Congress to allow market forces to set supply and price levels. 88 L.Ed.2d at 745-46. The Kansas Supreme Court's action in eliminating the ability of producers or purchasers to bargain for the right not to pay interest is equally inconsistent with this congressional intent. That court's action directly impacts the costs an interstate pipeline faces in selling gas in that market and "threaten[s] to distort the market once again" by "artificially increasing" costs faced by a producer. See 88 L.Ed.2d at 746.

[10] If the Commission wished to change the regulation to attempt to impose the liability Kansas imposed, it would have to repromulgate the regulation pursuant to the Administrative Procedure Act, 5 U.S.C. § 553. The Kansas Supreme Court's exercise of judicial fiat circumvents the protections that would be afforded Phillips and other interested parties in such a proceeding.

[11] The creation of federal common law by the court below violates the Commerce Clause. This Court has recognized that "[t]he

III. The Court Below Violated Principles Of Due Process And Full Faith And Credit By Failing To Give Effect To The Controlling Law Of Other States.

In its prior decision, this Court allowed Kansas to entertain a nationwide class action and adjudicate in one action the claims of over 28,000 individuals who were residents of all 50 states, the District of Columbia and several foreign countries. Recognizing the unique nature of the modern nationwide class action, this Court established certain *minimums* of procedural due process that must be accorded plaintiff class members. This Court went further, however, and recognized the limitations our federal system imposes on the states by overturning the Kansas Supreme Court's application of Kansas law to each of the transactions involved in this case. This Court held that constitutional limitations on choice of law "must

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very purpose of the Commerce Clause was to create an area of free trade among the several states." *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330-31 (1944). Because of this purpose, "the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States." *Freeman v. Hewit*, 329 U.S. 249, 252 (1946).

Kansas seems determined to assume the role of this nation's Natural Gas Royalty Czar. By doing so, the Kansas court has usurped Congress' power under the Commerce Clause and the freedom of other states in the Union to act when Congress has failed to do so. Through its use of the national class action device, and its creation of uniform interest liability rules—not surprisingly identical to its own—in effect Kansas exported and applied Kansas law to contractual transactions having no relation to Kansas whatsoever. In doing so, it has regulated interstate commerce in a wholly impermissible fashion and has deprived the other states of any opportunity to formulate their own policy for transactions in which they have far more substantial interest. Only Congress has the constitutional authority to regulate interstate commerce in the way and to the extent that Kansas has in this case. Because those actions of the Kansas Supreme Court violate the Commerce Clause, certiorari should be granted so that this Court can correct the situation.

be respected even in a nationwide class action." App. 86a.[12]

The actions of the Kansas court on remand upset the constitutional balances struck by this Court in its prior opinion. The interests of federalism, as impacted by a nationwide class action, require a strict adherence to those principles of Full Faith and Credit upheld in this Court's prior reversal of the Kansas court. Indeed, because of the dimension of the nationwide class action and its potential for impacting the rights of thousands and even millions of people in every other state, the significance of full faith and credit and the need to assure the proper application of the law of interested states is far greater than it is in the usual two-party actions that historically have brought governing law issues to this Court.

It was the patently unfair advantage that a class plaintiff may derive from commencing a nationwide action in a parochial forum that this Court's prior decision sought to check through choice-of-laws restrictions. What was done below on remand threatens to undermine this critical restraint. Only this Court can ensure that the nationwide class action device does not become one state's tool for imposing its favored local policies on the nation. The effectuation of the principles established by this Court's prior opinion in this case can only be accomplished by this Court in order to assure that Full Faith and Credit is given other states' laws.

In its decision, the court below failed to follow this Court's holding. Rather than examining the laws of the other states in a critical and searching fashion, the Kansas Supreme Court looked into a mirror and saw its "equitable" notions reflected in the laws of the other states. Having done so, that court blithely proceeded to

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[12] Phillips believes that choice of law is one of the safeguards announced by this Court for nationwide class actions. It is all part of the delicate balance of competing rights and power that due process requires be kept in equilibrium.

rewrite those laws to produce the desired "Kansas answer." As was noted above, when faced with conflicting rules of law that could not easily be rewritten, the federal regulation, 18 C.F.R. § 154.102, became the Kansas court's universal solvent for removing all impediments to both the imposition of liability for interest and the imposition of the higher federal rates.[13] By failing to construe candidly the laws of the other states, the court below did not honor its obligations under the Full Faith and Credit Clause.[14]

For example, the Kansas court rejected Louisiana precedent holding that additional royalties based upon Commission interim approvals are unliquidated and not ascertainable until final approval and thus do not give rise to interest liability. *Whitehall v. Boagni*, 255 La. 67, 229 So.2d 702 (1969). The Kansas court determined that interest on Louisiana royalties accrued prior to Commission approval, thereby eviscerating the effect of Louisiana's controlling precedent.

The court's lack of good faith also can be seen by the bald fabrication of an "industry practice" to defeat the effect of a controlling Oklahoma statute, Okla. Stat. tit. 23, § 8. App. 28a. That statute extinguishes liability for interest if the principal is paid and accepted. Al-

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[13] One is reminded of the following exchange between Alice and Humpty Dumpty:

> "The question is," said Alice, "whether you *can* make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master—that's all."

Lewis Carroll, *Through The Looking Glass; And What Alice Found There* (1872; reprint, New York: Avenel Books, n.d.), 124.

[14] The fact that the Kansas Supreme Court may have been "well intentioned" in what it did is not grounds for condoning what was, in reality, a bad faith review of state law. "She means well, but can't help saying foolish things, as a general rule." Carroll, op. cit., 196.

though the Oklahoma courts never have recognized an "industry practice" exception to this statute, and although the issue of the existence of such an "industry practice" was not raised by the royalty owners as a way to defeat that Oklahoma statute, the Kansas Supreme Court created this exception and purported to find facts to justify its application. If Phillips had any notice of that court's intent, it would have taken measures to demonstrate that no "industry practice" existed. Fabricating this exception to the Oklahoma statute and then applying it without affording Phillips any opportunity to address either the factual or legal basis of this determination, shows that the Kansas Supreme Court had no interest in carrying out this Court's mandate.

The lack of the Kansas Supreme Court's good faith in applying the laws of other states also is demonstrated in its seizing an issue that was not appealed and increasing post-judgment interest rates. Kansas post-judgment interest rates were imposed in the original judgment of the Seward County District Court and were not overturned on appeal or by this Court.[15] The district court on remand again correctly applied the Kansas post-judgment interest rate statute. The Kansas Supreme Court, *sua sponte*, reversed "the ruling insofar as it applied the Kansas post-judgment interest rate to the states of Texas, Oklahoma, Louisiana, New Mexico and Wyoming." App. 51a. In its motion for rehearing, Phillips emphasized that

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[15] Justice Stevens, in his concurring and dissenting opinion, noted that:

> The court also held that interest accruing after the entry of judgment should be determined by Kansas' post-judgment interest statute. Kan. Stat. Ann. § 16-204 (1974). Phillips does not and could not contend that the Constitution bars a Kansas court from applying the Kansas post-judgment interest statute to judgments entered by Kansas courts. Such statute demonstrate an irrefutable state interest in the force carried by judgments entered by a state's own courts.

App. 94a, n.11.

no question had been presented concerning the application of other states' post-judgment interest rates.[16] The Kansas Supreme Court denied rehearing and persisted in applying other states' higher post-judgment rates.[17] This *sua sponte* application of other states' post-judgment interest rates exceeded the jurisdiction of the Kansas court and violated the boundaries of proper judicial conduct.[18]

Unless this Court enforces careful adherence to the constitutional principles of choice of law in nationwide class actions, serious invasions of state judicial sovereignty are likely to occur through the use of this procedural device. "Both the Due Process and Full Faith and Credit Clauses ensure that the states do not 'reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.'" *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 337 (1981) (Powell, J., dissenting), *quoting World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980). If a state court in a nationwide class action can export its own notions of public policy by restructuring other states' laws to match its own, as Kansas has in this case,[19] these constitutional

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[16] Plaintiffs also responded to this motion and indicated that they had no objection to the application of Kansas post-judgment interest rates.

[17] Although denying rehearing, the Kansas Supreme Court excepted "the clarification of post-judgment interest rates" and modified the rate it had ascribed to Texas. App. 53a.

[18] See *Matter of Bybee*, 236 Kan. 443, 691 P.2d 37 (1984) (questions not presented to lower court cannot be decided on appeal) and *Haas v. Freeman*, 236 Kan. 677, 693 P.2d 1199 (1985) (without cross-appeal, court lacks jurisdiction to consider issues).

[19] Kansas' parochial bias for forum state policy can be seen in the district court's decision on remand, which termed it "inconceivable" that Phillips could seek the application of other states' statutory interest rates "which were established for the most part, prior to the 1940's, and at what best could be described as post-depression rates." App. 58a. The district court also declared that "I find no basis to conclude that any state court would be any less logical or fair than the Kansas Supreme Court has been in the *Shutts* case." App. 59a.

policies are defeated and a critical cornerstone of federalism is displaced.

If this Court leaves unchecked the excesses of the Kansas court, forum shopping will result. There is some evidence that it already has. Kansas' willingness to favor royalty owners may have spawned at least seven other reported Kansas nationwide class actions similar to the present one. No other state has a single reported decision involving a class action seeking interest on additional royalties. Kansas' attitude has led it to become a magnet attracting class actions on behalf of royalty owners.[20]

The jurisdictional freedom this Court extended to state courts to entertain nationwide class actions in the earlier phase of this case obliges this Court to be vigilant to make sure that the procedural device is not abused to the detriment of other states and litigants with legitimate expectations as to the law governing their activities. It is not

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[20] The seven similar Kansas class actions are: *Nix v. Northern Natural Gas Producing Co.*, 222 Kan. 739, 567 P.2d 1322 (1977), *cert. denied*, 434 U.S. 1067 (1978); *Sterling v. Superior Oil Co.*, 222 Kan. 737, 567 P.2d 1325 (1977), *cert. denied*, 434 U.S. 1067 (1978); *Maddox v. Gulf Oil Corporation*, 222 Kan. 733, 567 P.2d 1326 (1977), *cert. denied*, 434 U.S. 1065 (1978); *Shutts, Executor v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292 (1977), *cert. denied*, 434 U.S. 1068 (1978); *Wortman v. Sun Oil Co.*, 236 Kan. 266, 690 P.2d 385 (1984), *vacated*, —— U.S. ——, 88 L.Ed.2d 33 (1985); *Helmley v. Ashland Oil, Inc.*, 1 Kan. App.2d 532, 571 P.2d 345 (1977); *Gray v. Amoco Production Co.*, 1 Kan. App.2d 388, 564 P.2d 579 (1977), *modified*, 223 Kan. 441 (1978). Kansas has entertained nationwide class actions seeking to recover "market value" royalties for royalty owners. See *Matzen v. Cities Service Oil Co.*, 233 Kan. 846, 667 P.2d 337 (1983) (involving 16 consolidated class action natural gas royalty cases). It has a reported decision involving a nationwide class of royalty owners seeking to recover for helium extracted but not paid for. *Gigot v. Cities Service Oil Co.*, 241 Kan. 304 (1987). No other state has reported class actions of these types. Texas even has restricted the use of the class action device in "market value" cases. *Amoco Production Co. v. Hardy*, 628 S.W.2d 813 (1981).

sufficient if 49 states faithfully apply the law of other states. If the remaining state acts to advance its own policies in nationwide class actions under the guise of a "construction" of other states' law, it will become the Mecca for entertaining nationwide class actions and the threat to state sovereignty becomes a reality.[21] The constitutional protection created by the Full Faith and Credit and Due Process Clauses and enjoyed by a class action defendant—a right recognized by this Court in *Shutts*—also will be extinguished. This Court should issue a writ to the Kansas court to enforce those restrictions on nationwide class actions and choice-of-law announced in its prior opinion in this case.

IV. The Kansas Court's Utilization Of A Federal Regulation In A Manner Patently Unintended By Congress Or The Regulatory Agency That Promulgated It, Producing An Adverse Impact On Interstate Natural Gas Pricing, Violated The Supremacy Clause.

State action is invalid under the Supremacy Clause if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67-68 (1941).[22] This Court has exhibited particular concern with regard to state actions that "could seriously impair the [Commission's] authority to regulate the intricate relationship between the [gas] purchasers' cost structures and eventual costs to wholesale customers who sell to consumers in other states." *Northern Natural Gas Co. v. State Cor-*

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[21] This concern has been raised by commentators on this Court's opinion. See J.E. Kennedy, *The Supreme Court Meets The Bride Of Frankenstein: Phillips Petroleum Co. v. Shutts And The State Multistate Class Action*, 34 Kan. L. Rev. 255, 305 n.232 (1985).

[22] See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984); *Fidelity Federal Savings & Loan Association v. de la Cuesta*, 458 U.S. 141, 153 (1982).

poration Commission, 372 U.S. 84, 92 (1963).[23] This Court's sensitivity to this area stems from its recognition that the "federal regulatory scheme leaves no room either for direct state regulation of the prices of interstate wholesales of natural gas . . . or for state regulations which would indirectly achieve the same result." *Northern Natural Gas Co.*, 372 U.S. at 91.

As an integral part of its natural gas regulatory scheme, Congress and the Commission determined that producers who must refund price increases found to be unjustified should pay purchasers interest with those refunds. This determination, as one aspect of a comprehensive scheme, obviously impacts on the interstate pricing of natural gas. Kansas' imposing of this regulation and its interest requirements—in effect, on a nationwide scale—to royalty payments computed on the basis of pending gas price increases and forbidding efforts to avoid this interest liability contractually—actions not intended by Congress or by the Commission—impermissibly impacts interstate gas pricing and cannot withstand constitutional scrutiny. Because the decision of the Kansas Supreme Court violates the Supremacy Clause, certiorari should be granted.

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[23] See, *e.g.*, *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981); *Maryland v. Louisiana*, 451 U.S. 725, 746-52 (1981).

CONCLUSION

This Court should issue a writ of mandamus directing the Kansas Supreme Court to comply with its prior mandate, or should issue a writ of certiorari to consider the federal and constitutional questions arising from the Kansas Supreme Court's decision.

Respectfully submitted,

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87-348

No.

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PHILLIPS PETROLEUM COMPANY,
Petitioner,

v.

IRL SHUTTS and ROBERT ANDERSON and BETTY ANDERSON, Individually and as representatives of all producers and royalty owners to whom Phillips Petroleum Company made payment of suspended proceeds of royalties pursuant to Federal Power Commission Opinion Nos. 699, 699H, 749, 749C, 770 and 770A,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS AND PETITION FOR WRIT OF MANDAMUS

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180 pp

INDEX TO APPENDIX

		Page
1.	Opinion of the Kansas Supreme Court dated February 25, 1987 (240 Kan. 764, 732 P.2d 1286)	1a
2.	Order of the Kansas Supreme Court denying reconsideration dated May 11, 1987	53a
3.	Memorandum Decision of the District Court of Seward County, Kansas on remand, dated April 30, 1986	54a
4.	Opinion of the United States Supreme Court dated June 25, 1985 (472 U.S. 797)	60a
5.	Opinion of the Kansas Supreme Court dated March 24, 1984 (235 Kan. 195, 679 P.2d 1159)	111a
6.	Order of the Kansas Supreme Court denying rehearing dated May 11, 1984	154a
7.	Journal Entry of Judgment of the District Court of Seward County, Kansas filed May 20, 1983	155a
8.	18 C.F.R. § 154.102 as it existed during relevant periods (amendments subsequent to September 14, 1979, omitted)	165a
9.	Phillips Petroleum Co.'s Corporate Undertaking dated February 24, 1969	169a
10.	Phillips Petroleum Co.'s list of subsidiaries pursuant to Supreme Court Rule 28.1	175a

APPENDIX

SUPREME COURT OF KANSAS

No. 59,588 [1]

IRL SHUTTS, *et al.*,
Appellees,

v.

PHILLIPS PETROLEUM COMPANY,
Appellant.

SYLLABUS BY THE COURT

1. OIL AND GAS—*Interest on Suspended Royalties—Multi-state Class Action—Application of Equitable Principles of Unjust Enrichment.* In a multi-state plaintiff class action suit, the original decision of the Kansas Supreme Court, after review by the United States Supreme Court, is remanded for the proper due process constitutional standard to be applied. The United States Supreme Court held that for a state's substantive law to be selected in a constitutionally permissible manner, that state must have a significant contact or significant aggregation of contacts creating state interests, such that the choice of its law is neither arbitrary nor fundamentally unfair. On remand, it is *held*: After reviewing the law of the five states where the majority of the oil and gas leases in question are located, those jurisdictions would apply equitable principles of unjust enrichment to hold the

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[1] REPORTER'S NOTE: This case was argued by the parties and decided in conference by the Supreme Court prior to the retirement of Chief Justice Schroeder and the appointment of Justice Allegrucci.

producer or purchaser of gas liable to its royalty owners for interest on suspended royalties held by the gas purchaser or producer pending approval of rate increases by the Federal Power Commission, now the Federal Energy Regulatory Commission.

2. SAME—*Interest on Suspended Royalties—Multi-state Class Action—Purchaser or Producer of Gas Required to Pay Interest to Royalty Owners on Funds Held in Suspense.* After reviewing the law of the five states where the majority of the oil and gas leases in question are located, it is *held*: Under equitable principles those states would imply an agreement binding the producer or purchaser of gas to pay the funds held in suspense to the royalty owners when the Federal Power Commission approved the respective rate increases, together with prejudgment interest at the rates and in accordance with the Federal Power Commission regulations found in 18 C.F.R. § 154.102 (1986).

3. JUDGMENTS—*Reversal of Judgment by U.S. Supreme Court—Post-judgment Interest Runs from Time of New Judgment.* The action taken by the United States Supreme Court upon reviewing the conflict of laws issue in this case constitutes a full reversal and, as such, the original judgment and interest awarded by the district court is vacated and post-judgment interest runs from the time the new judgment is entered, as more fully set forth in the opinion.

4. SAME—*Post-judgment Interest in Multi-state Class Action on Oil and Gas Suspended Royalties—Post-judgment Interest for Royalty Owners Determined by State in Which Lease Exists.* Post-judgment interest for royalty owners having leases in Texas, Oklahoma, Louisiana, New Mexico, and Wyoming are determined by the statutory rate of post-judgment interest for each of the respective states which is in effect on the date of the new judgment. The Kansas statutory rate

of post-judgment interest applies to those royalty owners having leases in Kansas and all other jurisdictions involved, as more fully stated in the opinion.

Appeal from Seward district court; KEATON G. DUCKWORTH, judge. Opinion filed February 25, 1987. Affirmed as modified.

Joseph W. Kennedy, of Morris, Laing, Evans, Brock & Kennedy, Chartered, of Wichita, argued the cause, and *Robert W. Coykendall*, of the same firm, *Arthur R. Miller*, of Cambridge, Massachusetts, and *T. L. Cubbage, II*, of Bartlesville, Oklahoma, were with him on the briefs for the appellant.

Gordon M. Penny, of Chapin & Penny, of Medicine Lodge, argued the cause, and *W. Luke Chapin*, of the same firm, *Harold Greenleaf*, of Smith, Greenleaf & Brooks, of Liberal, and *Ed Moore*, of Ginder & Moore, of Cherokee, Oklahoma, were on the brief for the appellees.

The opinion of the court was delivered by

SCHROEDER, C.J.: This is the third time this class action case has come before the Supreme Court for review. In *Shutts, Executor v. Phillips Petroleum Company*, 222 Kan. 527, 567 P.2d 1292 (1977) (*Shutts I*), a class action against Phillips Petroleum Company (Phillips), plaintiffs sought to recover interest on "suspense royalties" attributable to gas produced from leases in the three-state Hugoton-Anadarko area, the largest physical portion of which was located in Kansas, during a nine-year-period from June 1961 to October 1970. The named plaintiff, a Kansas resident, was a representative of a class of 6,400 gas royalty owners, 218 of whom were Kansas residents. This court ruled it could exercise in personam jurisdiction over unnamed nonresident class plaintiffs where procedural due process was satisfied by notice, an opportunity to be heard, and adequate representation. Having found the class action was proper and binding on nonresident plaintiffs, this court also ruled

that, under the equitable principle of unjust enrichment, Phillips was liable to the plaintiffs for interest on the suspended royalties in the amount set forth under Phillips' corporate undertaking with the Federal Power Commission (FPC), seven percent per annum, with an additional statutory post-judgment interest of eight percent per annum.

Shutts v. Phillips Petroleum Co., 235 Kan. 195, 679 P.2d 1159 (1984) (*Shutts II*), was factually similar to *Shutts I*. A class action suit was brought by Irl Shutts and Robert and Betty Anderson, individually and on behalf of 28,100 royalty owners, including residents of all 50 states, the District of Columbia, the Virgin Islands, and several foreign countries, against Phillips for recovery of interest on suspended gas royalties. These royalty payments were withheld by Phillips at various times while Phillips awaited approval by the FPC for gas price rate increases. When approval was granted, Phillips paid the total amount of the suspended royalties to the royalty owners without interest. It was held first that Kansas had in personam jurisdiction over the nonresident class members as the procedural due process requirements were satisfied when each class member was provided notice by first-class mail describing the action and informing each member he could appear in person or by counsel, and otherwise he would be represented by Shutts and the Andersons, and that class members would be included in the class and bound by the judgment unless they "opted out" of the suit by returning a "request for exclusion." Second, as to the choice of law issue, it was held that, under Kansas law and the principles of equity, Phillips was liable for interest to the royalty owners on the suspended royalties at the rates set forth in Phillips' corporate undertaking with the FPC; seven percent per annum prior to October 10, 1974; nine percent per annum thereafter until September 30, 1979; and thereafter, at the average prime rate compounded quarterly. Statutory post-judgment interest of fifteen percent per annum

(K.S.A. 16-204) was also imposed. In determining that Kansas law applied, it was stated:

> "In *Shutts I* it was held the rate of interest set forth in the corporate undertaking established an appropriate measure of damages to compensate the plaintiffs for the unjust enrichment derived by Phillips from the use of the plaintiffs' money. In the instant case Phillips has not satisfactorily established why this court should not apply the rule enunciated in *Shutts I* and instead look to the law of each state where leases are located to determine whether damages should be based upon a rate different from that set forth in the FPC undertaking. The general rule is that the law of the forum applies unless it is expressly shown that a different law governs, and in case of doubt, the law of the forum is preferred. 16 Am. Jur. 2d, Conflict of Laws § 5. Where a state court determines it has jurisdiction over a nationwide class action and procedural due process guarantees of notice and adequate representation are present, we believe the law of the forum should be applied unless compelling reasons exist for applying a different law. All of the plaintiff class members in this lawsuit were given actual notice that this action was being brought on their behalf in Kansas. The plaintiffs had the opportunity to opt out of the lawsuit, but chose to have their claims litigated in the Kansas courts. We have hereinbefore held the unnamed plaintiff class members were adequately represented in the lawsuit and that the forum has a significant legitimate interest in adjudicating the claims of the class members. The common fund nature of the lawsuit provides an excellent reason to apply a uniform measure of damages to the class as a whole, as each member of the class has been similarly deprived of the rightful use of his or her money. The plaintiff class members have indicated their desire to have this action determined under the

laws of Kansas. Compelling reasons do not exist to require this court to look to other state laws to determine the rights of the parties involved in this lawsuit." 235 Kan. at 221-22.

Phillips appealed to the United States Supreme Court, *Phillips Petroleum Company v. Shutts*, 472 U.S. 797, 86 L. Ed. 2d 628, 105 S. Ct. 2965 (1985). The United States Supreme Court first ruled Kansas properly accepted jurisdiction over the nonresident plaintiffs as the procedural due process requirements were satisfied, as stated above. 472 U.S. at 814. As to the choice of law question, however, it was ruled the application of Kansas law to all of the investors' claims for interest violated the due process and full faith and credit clauses. In its analysis, the Court first noted that if the law of Kansas was not in conflict with any of the other jurisdictions connected to the suit, then there would be no injury in applying the law of Kansas. 472 U.S. at 816. The Court then cited differences in the laws of Kansas, Texas, and Oklahoma which Phillips *contended* existed. It appears, however, no analysis was made by the Court to determine whether these differences existed in fact. The Court stated:

"Petitioner claims that Kansas law conflicts with that of a member of States connected to this litigation, especially Texas and Oklahoma. *These putative conflicts range from the direct to the tangential, and may be addressed by the Supreme Court of Kansas on remand under the correct constitutional standard.*

. . . .

"The conflicts on the applicable interest rates, alone—*which we do not think can be labeled 'false conflicts' without a more thorough-going treatment than was accorded them by the Supreme Court of Kansas*—certainly amounted to millions of dollars in liability. We think that the Supreme Court of Kan-

sas erred in deciding *on the basis that it did* that the application of its laws to all claims would be constitutional." (Emphasis added.) 472 U.S. at 816-18.

The basis of Kansas contacts reviewed and rejected by the Court included the common fund analogy. Because Phillips had commingled the suspended royalties with its general corporate account, the Court found there was no specific identifiable res in Kansas, nor any limited amount to deplete before every plaintiff was compensated. The idea that all the plaintiffs consented to be bound by Kansas law when they failed to "opt out" of the suit was rejected because a plaintiff's desire is rarely, if ever, controlling on the choice of applicable law. Finally, the fact that a nationwide class action was being adjudicated and the requirements of procedural due process satisfied was found not to be a sufficient reason to apply the law of the forum.

> "Kansas must have a 'significant contact or aggregation of contacts' to the claims asserted by each member of the plaintiff class, contacts 'creating state interests' in order to ensure that the choice of Kansas law is not arbitrary or unfair. *Allstate* [*Ins. Co. v. Hague*, 449 U.S. 302, 312-13, 66 L. Ed. 2d 521, 101 S. Ct. 633, *reh. denied* 450 U.S. 971 (1981)]. *Given Kansas' lack of 'interest' in claims unrelated to that State, and the substantive conflict with jurisdictions such as Texas, we conclude that application of Kansas law to every claim in this case is sufficiently arbitrary and unfair as to exceed constitutional limits.*" (Emphasis added.) 472 U.S. at 821-22.

Again, those constitutional limitations are "that for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts creating state interests, such that choice of its law is neither ar-

bitrary nor fundamentally unfair." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13, 66 L. Ed. 2d 521, 101 S. Ct. 633, *reh. denied* 450 U.S. 971 (1981). It is important to note the Court stated the following:

> "We make no effort to determine for ourselves which law must apply to the various transactions involved in this lawsuit, and *we reaffirm our observation in Allstate that in many situations a state court may be free to apply one of several choices of law.* But the constitutional limitations laid down in cases such as *Allstate* and *Home* [*Ins.*] *Co. v. Dick*, [281 U.S. 397, 74 L. Ed. 926, 50 S. Ct. 338 (1930)], must be respected even in a nationwide class action." (Emphasis added.) *Phillips*, 472 U.S. at 823.

On remand, the district court of Seward County, Kansas, reviewed the laws of the other states involved and found no conflicts existed with the laws of Kansas on the two issues of liability and applicable interest rate. The decision made by this court in *Shutts II* was adopted by the district court.

Phillips brings this appeal arguing (1) the district court on remand failed to follow the decision of the United States Supreme Court, (2) the laws of the other states connected to this suit conflict with the laws of Kansas, and (3) the district court erred in imposing post-judgment interest of fifteen percent.

Here, the gas produced by Phillips is produced in eleven different states: Kansas, Texas, Oklahoma, Louisiana, New Mexico, Wyoming, Arkansas, Illinois, Mississippi, Utah, and West Virginia. The leases located in Texas and Oklahoma make up 82% of Phillips' total leases nationwide. The leases in Kansas, Louisiana, New Mexico, and Wyoming total 17% of Phillips' nationwide leases. Following is a chart of the interests of the states where 97% of the leases are located:

	No. Leases in State	Royalties to State Leases	No. Royalty Owners in State	Royalties Paid to State Royalty Owners
TEXAS	11,595	$5,626,114.55	26,022	$4,677,541.43
OKLAHOMA	4,644	$ 797,997.37	8,928	$1,340,714.42
NEW MEXICO	1,882	$ 651,045.07	1,429	$ 449,544.13
WYOMING	1,234	$1,161,918.03	722	$ 683,428.51
LOUISIANA	272	$3,056,335.64	2,345	$2,369,714.92
KANSAS	22	$ 2,887.22	1,553	$ 122,638.40

We will review the laws of each of these states as applicable to the two issues involved: (1) whether Phillips is liable to the royalty owners for interest on the suspended royalties; and (2) if Phillips is liable, what is the applicable interest rate?

TEXAS

LIABILITY

The leading Texas case on liability for interest on suspended royalties is *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480 (Tex. 1978). There, Phillips was a buyer and Stahl the seller under a casinghead gas contract. Under the contract, the price Phillips paid to the seller was based on what Phillips was receiving on its sales to third parties. Phillips had requested price increases with the FPC as to the sales it made to third parties. Pending FPC approval, Phillips was collecting the increased prices from those third parties, and placing the increase in a general fund. Phillips, however, did not increase its payments to Stahl. Upon final approval of the price increases by the FPC on October 30, 1972, Phillips recomputed the payments to Stahl and on December 7, 1972, paid it $24,000 without interest. Three years later, Phillips sought a declaratory judgment that: (1) under the contract, it was not liable to Stahl for the $24,000; (2) if Phillips was liable, it was not liable for interest; and (3) if Phillips was liable for interest, it was not liable for interest prior to October 30, 1972, the date of the FPC's final approval. On June 28, 1976, the

trial court ruled that, under the contract, Phillips was not expressly, but was impliedly, obligated to pay Stahl $24,000, and that Phillips was not liable for interest.

The case first came up for review before the Texas Court of Civil Appeals in *Stahl Petroleum Co. v. Phillips Petroleum Co.*, 550 S.W.2d 360 (Tex. Civ. App. 1977). There, Stahl argued it was entitled to $14,000 interest accruing to the date of payment and it was entitled to $3,000 interest on the $14,000 to the date of judgment. The appellate court did not rely on *Phillips Petroleum Company v. Adams*, 513 F.2d 355 (5th Cir.), *cert. denied* 423 U.S. 930 (1975), which will be discussed later, but instead relied on a common-law principle to find Phillips liable for interest on the $24,000. That common-law principle is that "interest cannot be allowed *eo nomine*—*i.e.*, under that name—unless especially provided for by statute, except where interest is assessed, sans statutory sanction, as damages to indemnify a party for a wrong done to him." 550 S.W.2d at 365. The court stated that, under the facts presented, the claim for interest was not an element of damages for tortious injury, but rather a claim under a contract and, therefore, had to be authorized by statute. The applicable statute at the time the contract was executed defined "interest" as "the compensation allowed by law or fixed by the parties to a contract for the use or forbearance or detention of money." 550 S.W.2d at 365. It was stated that Stahl claimed interest because Phillips used Stahl's money, and the sum due was ascertainable and came within the meaning of the statute. Stahl recovered $14,000 interest and $3,000 interest on that sum.

On review by the Texas Supreme Court, that the court stated the common-law rule that prejudgment interest cannot be allowed *eo nomine* unless provided for by contract or statute has not been rigidly or consistently applied in a manner which would deny a party legal compensation for the use or detention of his money. *Phillips*

Petroleum Co. v. Stahl Petroleum Co., 569 S.W.2d 480. The Supreme Court found the court of civil appeals had reached the correct result, but did not agree with that court that Stahl's right to recover existed only under an enabling statute. The Supreme Court relied on *Phillips Petroleum Company v. Adams*, 513 F.2d 355, a federal case interpreting Texas law. In *Adams, Phillips was held liable for interest on delayed payments under the equitable principle that Phillips should not be able to use someone else's money, thereby receiving a benefit, yet paying nothing.* Thus, the Texas Supreme Court ruled that interest for the use of money is an equitable exception to the common-law rule of interest *eo nomine*. Stahl, 569 S.W.2d at 487. The court affirmed Stahl's award of $14,000 interest (six percent interest on the $24,000 suspended payments) and the additional $3,000 interest (six percent on the $14,000 interest liability).

Cases subsequent to *Stahl* have also awarded interest based upon equitable principles. *Fuller v. Phillips Petroleum Co.*, 408 F. Supp. 643, 646 (N.D. Tex. 1976) (Phillips liable as a distributor to the gas producer for interest on money it held and used for its own corporate purposes); *MCZ, Inc. v. Smith*, 707 S.W.2d 672 (Tex. App. 1986) (court can award prejudgment interest based upon equity for compensation of another's use of his funds); *Gulf Const. Co., Inc. v. Self*, 676 S.W.2d 624 (Tex. App. 1984) prejudgment interest can be awarded as damages under equitable principles); *Behring Intern. v. Greater Houston Bank*, 662 S.W.2d 642 (Tex. App. 1983) (court may elect to fix prejudgment interest rate by using equitable principles or statutory method); *Standard Fire Ins. Co. v. Fraiman*, 588 S.W.2d 681 (Tex. Civ. App. 1979) (insurance company retained money that should have been paid to insured and court held insurance company should not be unjustly enriched).

Phillips argues several points to show why, under Texas law, it is not liable for the interest on the sus-

pended royalties. (These arguments were rejected by this Kansas court in *Shutts II.*)

First, Phillips argues that under its casinghead gas contract, it is a purchaser rather than a producer of gas, and, therefore, it pays royalties only when so ordered by the producer of the gas. Phillips relies on the following contract provision:

> "For the account and on behalf of Seller, Buyer agrees to disburse such royalties, overriding royalties, bonus payments and production payments, as Seller shall from time to time direct, accruing from the production and sale of gas hereunder. Buyer shall deduct such payments from the amounts due Seller hereunder. Seller agrees to indemnify and hold Buyer harmless from loss and damages resulting from payments made pursuant to Seller's direction. Notwithstanding, Seller may elect initially to make all payments accruing from the production and sale of gas hereunder to the owners of all royalties, overriding royalties, bonus payments and production payments and to hold Buyer harmless therefrom in which event Buyer shall have no obligation with respect to disbursement of such payments as first above provided."

Therefore, Phillips argues, the royalty owners should be seeking recovery of interest from the producer, rather than Phillips, upon a showing that Phillips did not distribute the monies as instructed by the producer. To bolster this argument, Phillips cites *Exxon Corp. v. Middleton*, 613 S.W.2d 240 (Tex. 1981), where the Texas Supreme Court wrestled with a clause in a lease agreement whereby royalties paid would be based on the market value of the gas "sold off" certain leases. Exxon argued the effective date on which the gas was "sold" was when Exxon's long-term gas contracts became effective. The court found the gas was sold when it was delivered. The court recognized that the transaction involved two

agreements, the lease agreement and the gas contract, and stated Exxon's royalty obligations were determined by the lease agreements which required royalties of one-eighth of the market value of gas when delivered. The lease agreements were made independent of, and were unaffected by, the gas contracts. 613 S.W.2d at 245.

Phillips' argument on this point, that it was a purchaser and not a producer, lacks merit for two reasons. First, it is noted that in a news release date March 20, 1975, Phillips had apparently agreed to make royalty payments for its producers:

> "—Phillips Petroleum Company has announced the following policy regarding payments to producers from whom it purchases gas under percentage of proceeds type contracts executed on or after January 1, 1973, and to royalty owners to whom it makes payments for gas produced from wells commenced on or after January 1, 1973, or from wells drilled prior to January 1, 1973, and said gas sold pursuant to contracts executed on or after January 1, 1973, based upon Phillips resale rates authorized by the Federal Power Commission's Opinion No. 699, as amended."

Additionally, in Phillips' answers to interrogatories, it indicated it had accepted the responsibility of the producers' royalty owners; Phillips was asked how many class members had contractually released Phillips from liability for interest, and Phillips answered: "The total number is unknown at this time. Phillips has not yet determined all of the producers, and through them, the royalty owners involved."

In any event, by agreeing to pay the royalty owners of the producers, Phillips would again be retaining the suspended royalties and *using* those funds until the ultimate distribution was made on behalf of the producers. Therefore, under these circumstances, it makes no difference that Phillips was the purchaser and not the producer under the gas contracts.

Next, Phillips argues that a special set of gas purchase contracts existed which included a "without interest" clause, as follows:

> "The price per Mcf. that buyer receives under the 'sales contract' is, or may be, subject to regulation by the Federal Power Commission. The phrase 'price per Mcf. that buyer receives,' as used in this contract, shall mean only that portion of the price exclusive of any tax reimbursement then being collected by buyer under the sales contract which is not subject to possible future refund by buyer. If buyer is later determined to be entitled to retain all or part of any amount collected subject to refund and is relieved from all further obligation to refund with respect thereto, buyer shall retroactively recalculate the price payable hereunder and shall pay seller the difference, *without interest*, between the amount previously paid seller hereunder and the amount which would have been payable based on the price which buyer is so permitted to retain." (Emphasis added.)

Phillips argues that because the contract allowed it to recalculate retroactively the money due to the seller, the money Phillips was holding belonged to Phillips and no unjust enrichment can be found. Phillips cites *Stahl* as approving this method to avoid liability for interest. However, the court in *Stahl* recognized that the gas purchase contract was subject to valid federal laws and regulations. The alternative suggested by the Texas Supreme Court did not include a "without interest" clause which is contrary to federal laws which require the payment of interest. Under its corporate undertaking, Phillips agreed to comply with the refunding provisions of 18 C.F.R. § 154.102 (1986), which sets forth the interest rates applicable to refunds. The alternatives did not suggest anything contrary to federal law, but suggested ways to

pay producers while waiting for FPC approval. These alternatives do not vitiate any interest on the refunds:

> "On the contrary, the Court recognized that the contract was subject to valid federal laws and regulations. Since any portion of the increased prices received by Phillips was subject to refund, with interest, to its purchasers if finally disapproved by the FPC, it follows as a matter of law that any portion of the 'refundable money' which had been paid to Stahl under its contract was likewise subject to reimbursement with interest to Phillips. Thus, if Phillips had made its monthly payments to Stahl based on its percentage of the weighted average 'price received' by Phillips during all of the years pending FPC action, the only amount necessary to be ascertained as between Stahl and Phillips after the FPC opinion became final on October 30, 1972, would have been the portion of Stahl's payments which were refundable *with interest*, to Phillips. Only the 'sustainable' remainder would have been retainable by Stahl, and having been paid when due, there would have been no issue concerning interest.
>
> "Phillips' concern over this literal interpretation of the unambiguous terms of the contract is understandable, but Phillips prepared the contract. It knew that its receipts from interstate sales were subject to regulation by the FPC. It would have been a simple matter for the contract to have provided that increased prices from interstate sales would not be figured in the 'weighted average price received' until after approval by the FPC, if that had been the intention of the parties. Or, it could have been provided that the percentage of monthly payments based on unapproved interstate price increases would be withheld unless Stahl indemnified Phillips by a surety bond or other guarantee that Stahl would refund to Phillips, with interest, any portion of its

payments attributable to price increases which were subsequently disapproved by a valid order of the FPC." *Stahl*, 569 S.W.2d at 484.

It does not appear from this language that the Texas court would approve the "without interest" contracts which are contrary to federal regulations.

Next, Phillips argues that as a *user* of the gas, it cannot be held liable for interest. This argument makes very little sense. Phillips argues that as much as 70% of the gas it purchases is used by Phillips itself, and not sold to interstate pipeline companies. Therefore, Phillips argues, because it used the gas rather than sold it, Phillips "did not necessarily make use of another's money, rather Phillips merely suspended payment of a small portion of the purchase price until its final obligation became certain." First, it is noted that under the lease agreement Phillips agreed to pay a royalty on gas "produced . . . and sold or *used* off the premises." Second, the argument that the transaction amounted to nothing more than an unliquidated claim on which no interest accrues lacks merit and was rejected in *Stahl*, where the court stated the terms of the contract "provided the means for ascertaining the sums due and payable to Stahl each month." 569 S.W.2d at 483. The lease agreements involved here also include such a provision.

Finally, Phillips argues that under Texas law its obligation for interest stopped as of the dates it offered indemnity agreements to the royalty owners. Under the indemnity agreements, Phillips agreed to pay the royalty owners the increased royalties pending FPC approval and, in exchange, the royalty owners agreed to refund to Phillips, with interest, any amount of the increased royalties not approved by the FPC.

In *Phillips Petroleum Company v. Adams*, 513 F.2d 355, Adams had a lease agreement with Phillips. Adams later assigned that lease to Schnell. A dispute developed

over whether Schnell or Adams should get the suspended royalties held by Phillips. The court ruled Phillips was liable to Adams under equitable principles of unjust enrichment for interest on the suspended royalties. That interest, however, stopped running as of the date that Phillips, as stakeholder of the funds, offered to pay the suspense money into court even though the funds were not actually paid until some months later. The court cited authority that:

> "once a stakeholder makes an *unconditional* offer to give up possession of a disputed fund, it ceases to exert that dominion over the money sufficient to justify an obligation to pay interest thereon, and the rule is that once such an *unconditional* tender is made, any liability for interest ceases as of the date of tender." (Emphasis added.) 513 F.2d at 370.

A similar situation arose in *Phillips Petroleum Co. v. Hazlewood*, 409 F. Supp. 1193 (N.D. Tex. 1975), *aff'd* 534 F.2d 61 (5th Cir. 1976), where Hazlewood assigned his leasehold estate to Alstar Production Corporation. Phillips was holding suspense monies totaling $57,000. Phillips paid that money to Alstar on June 30, 1971, under an agreement that Alstar would repay Phillips the money and indemnify it for any loss, together with interest. Alstar repaid Phillips the money and Phillips deposited the money with the court. The court held, under *Adams*, Phillips' interest obligation to Hazlewood ended as of June 30, 1971, because after that date Phillips no longer had the free use of the money.

In *Fuller v. Phillips Petroleum Co.*, 408 F. Supp. 643, Fuller, the producer of the gas, sued Phillips, its distributor, for monies held in suspense by Phillips pending FPC approval. Eventually, Fuller and Phillips entered into an indemnity agreement whereby the Fullers would receive the higher prices and, if the FPC later denied the price increases, the Fullers would refund the same to Phillips with interest. The indemnity agreements

were silent on the question of interest Phillips would pay to the Fullers if the price increase was approved. The Fullers sought to recover interest on the funds held by Phillips up to the time that they were paid to the Fullers under the indemnity agreements. Citing *Adams*, the court ruled the Fullers were entitled to payment of interest until the time Phillips lost the reasonably free use of the money—the dates of the indemnity agreements. 408 F. Supp. at 646.

Finally, *Phillips Petroleum v. Riverview Gas Compression, Co.*, 409 F. Supp. 486 (N.D. Tex. 1976), involved indemnity agreements between the producers of gas and Phillips, the distributor. Under the agreements, the monies would be paid to the producers, and if the FPC ruling required a refund, then the producers agreed to refund the monies to Phillips together with interest. Consistent with *Adams*, the court ruled that the interest liability ceased when Phillips lost the reasonably free use of the money—the date Phillips offered pay-out. The case was remanded to determine the dates the offers of indemnity agreements were made.

There are two flaws in the analysis of the federal district court in *Riverview*. First, although an offer to pay out has been made, when indemnity agreements are never executed Phillips retains the money and its reasonably free use. Second, the indemnity agreements in both *Riverview* and *Fuller* do not appear to be the *unconditional* type of offer upon which *Adams* is based. Under the indemnity agreements involved in the instant case, the royalty owners would receive an early payout only if they agreed to refund the money to Phillips with seven percent interest, or the same rate which Phillips is required to pay by any applicable FPC order, whichever is the higher rate. Additionally, the royalty owners or producers had to obtain an acceptable and irrevocable letter of credit issued by a bank to secure the amount of the refund together with interest. No Texas state

court has ruled on this particular situation. However, it does not appear that the offers of the indemnity agreements in this case are *unconditional* offers of pay-out.

To summarize, Texas law would clearly impose liability on Phillips for interest on the suspended royalties based upon equitable principles hereafter more fully discussed. We do not think the Texas Supreme Court would hold the liability for interest ceased as of the date Phillips offered conditional indemnity agreements to its royalty owners when no agreement was executed.

INTEREST RATE

In the *above cases* where liability for interest was accessed, the applicable interest rate was the Texas statutory legal rate of interest, six percent. Tex. Rev. Civ. Stat. Ann. art. 5069--1.03 (Vernon 1971) states:

> "When no specified rate of interest is agreed upon by the parties, interest at the rate of six percent per annum shall be allowed on all written contracts ascertaining the sum payable, from and after the time when the sum is due and payable; and on all open accounts, from the first day of January after the same are made."

This statute was amended in 1979 to read as follows:

> "When no specified rate of interest is agreed upon by the parties, interest at the rate of six percent per annum shall be allowed on all accounts and contracts ascertaining the sum payable, commencing on the thirtieth (30th) day from all after the time when the sum is due and payable."

When there is proof of an oral agreement as to a specific, determinable rate of interest, the transaction is governed by Tex. Rev. Civ. Stat. Ann. art. 5069-1.02 (Vernon 1971), which provides for a maximum interest rate of ten percent. *Moody v. Main Bank of Houston*, 667 S.W.2d 613 (Tex. App. 1984).

No Texas court ever mentioned the higher rates set by federal regulations to which Phillips had agreed to comply in its corporate undertaking. See *Phillips Petroleum Company v. Adams*, 513 F.2d 355 (5th Cir. 1975), *cert. denied* 423 U.S. 930 (1979); *Phillips Petroleum Co. v. Hazlewood*, 409 F. Supp. 1193; *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480, 488 (Tex. 1978). *This issue has not been determined by the Texas Supreme Court.*

Post-judgment interest, or interest on the interest, was awarded at the rate of six percent in *Fuller v. Phillips Petroleum Co.*, 408 F. Supp. 643, 648 (N.D. Tex. 1976).

OKLAHOMA

LIABILITY

There are no Oklahoma cases involving liability for interest on suspended royalties. However, in *West Edmond Hunton Lime Unit v. Young*, 325 P.2d 1047 (Okla. 1958), royalty owners sued a unit organization for failing to get the highest prices for oil produced. Under the plan, the unit was the agent and trustee of all royalty owners and had a duty to sell all royalty oil for the highest market value or posted price. The Oklahoma Supreme Court ruled that, based upon principles of equity and the Oklahoma statute requiring prejudgment interest on liquidated claims, the royalty owners were entiled to the difference between what the oil was sold for and the highest available price. Prejudgment interest on that amount was assessed from the last day of the sale of the oil for less than the highest available price. 325 P.2d at 1052.

Additionally, in *First Nat. Bank v. Iowa Beef Processors*, 626 F.2d 764 (10th Cir. 1980), prejudgment interest was awarded in a situation where one party had the use of another's money. There, Wheatheart owed IBP money from a dishonored check, and IBP owed Wheatheart money for cattle purchased. Wheatheart declared

bankruptcy before IBP paid for the cattle, and IBP never paid anyone for the cattle. The bank had a security interest in the cattle and IBP's claim of setoff for the dishonored check was in conflict with the bank's security interest. The court first ruled the bank had priority over IBP. Second, the court ruled the bank had a right to proceed against IBP for the amount due on the cattle purchased together with interest. The court stated "[t]his result is not unfair to IBP; it had the use of the money during all of this time." 626 F.2d at 771. See *Rendezvous Trails of America, Inc. v. Ayers*, 612 P.2d 1384, 1385 (Okla. App. 1980), where it is stated the traditional market place function of interest is to compensate another for the use of the money.

Phillips cites the Oklahoma statute concerning the statutory rate of interest as authority that Phillips cannot be held liable for interest under Oklahoma law. Okla. Stat. tit. 23, § 6 (1981), provides as follows:

> "Any person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt."

Phillips argues "prejudgment interest would not accrue on Phillips' obligation to pay suspended royalties since, until final approval of an increased FPC price that would justify payment of those suspended royalties, the amount of the ultimate obligation is not capable of being determined."

There is no Oklahoma case addressing the issue of whether claims for suspended royalties are unliquidated claims. However, a survey of Oklahoma law shows where Oklahoma courts have drawn the line as to certainty for damages in order to recover prejudgment interest. In

cases where the court must make a determination of an object's market value, or the amount of damages involved, the damages have been ruled unliquidated and prejudgment interest is denied. *Jesko v. American-First Title & Tr. Co.*, 603 F.2d 815 (10th Cir. 1979) (in a suit against a title insurer for failure to defend title, the insured was not entitled to prejudgment interest based on loss of one-third of insured's land since the extent of such loss was not mathematically ascertainable until the court placed a value on the land); *Liberty Nat. Bank & Tr. Co. of Okl. City v. Acme Tool*, 540 F.2d 1375 (10th Cir. 1976) (involving the negligent conduct of a sale by a bank, damages were not certain because determination of market value of property to be sold had to be made; *Wilshire Oil Co. of Texas v. Riffe*, 406 F.2d 1061 (10th Cir.), *cert. denied* 396 U.S. 843 (1969) (corporation sued former corporate officer for profits made while officer participated in competitive enterprises, damages held to be unliquidated); *Sandpiper North Apartments v. Am. Nat. Bank*, 680 P.2d 983 (Okla. 1984) (contractor sued subcontractor's bank for misapplication of funds of progress payments contractor made to subcontractor; no judgment interest awarded because the amount of the fund involved was unknown until judgment was entered).

However, as to claims arising under contracts, express or implied, the rule that prejudgment interest is denied on unliquidated damages has been modified. See Note, *Prejudgment Interest in Oklahoma*, 34 Okla. L. Rev. 643 (1981). In *Frankfurt v. Bunn*, 408 P.2d 785 (Okla. 1965), the court ruled that where the amount sued for was capable of ascertainment by computation, even though the amount is unliquidated, prejudgment interest will not be denied. *Frankfurt* involved an action for recovery of money under an oral contract for electrical work and materials furnished by the plaintiff in repairing the defendant's hotel. The oral contract provided the

defendant would "pay along on his bill" as the work progressed, and the court ruled the damages were ascertainable by computation. See also *First Nat. Bank v. Iowa Beef Processors*, 626 F.2d at 770 ("Almost any lawsuit involves some dispute over defendant's liability. As to the sum certain aspect, the correct inquiry is whether 'the amount sued for' can be ascertained prior to judgment.")

The rule regarding prejudgment interest is also given flexible treatment. In *Robberson Steel Co. v. Harrell*, 177 F.2d 12 (10th Cir. 1949), it was stated:

> "It is the general rule of law in Oklahoma that interest on an unliquidated account or claim is not recoverable until the amount due is fixed by judgment. (Citations omitted.) But compensation is a fundamental principle of damages, whether the action be in contract or tort; and one who fails to perform his contract is justly bound to make good all damages which naturally and reasonably accrue from the breach. And while generally interest is not allowed upon unliquidated damages prior to the entry of judgment, the court may in the exercise of a sound discretion include interest or its equivalent as an element of damages when it is necessary in order to arrive at fair compensation." 177 F.2d at 17.

Here, although the *specific* amount of royalties due is not known until the FPC grants final approval of the rate increases, Phillips is aware that the amount due will be in the range between the price increases it requested and the prices actually being collected. If the Oklahoma courts were faced with this issue, having no Oklahoma precedent on point, they would probably look to see how other jurisdictions have ruled. It should be noted that the Texas Supreme Court rejected an argument made by Phillips in *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480, that the sum payable under the contract was not ascertainable until the FPC

granted final approval. The Oklahoma Supreme Court cited with approval the rationale of the Texas Court of Appeals, holding the sum due was ascertainable:

> " 'At the time the contract was executed, Phillips, as permitted during the pendency of its applications for increases in the interstate commerce rates for its gas sales, was receiving from its purchasers and accepting as payment for its gas an amount of money in excess of the then established rates. Albeit the excess was subject to possible refund, none of the excess was contractually excluded from the "price received" by Phillips and on which payment to Stahl was contractually based. Phillips candidly concedes that neither statutory or decisional law nor the rules and regulations of the Federal Power Commission prohibit Phillips from including the excess in the amount on which calculation of payment to Stahl was made. It naturally follows that the portion of the prices exceeding the then approved interstate commerce rate received by Phillips from its gas sales in the Panhandle Field was, under the plain meaning of the language of the contract, a part of the "price received" on which the month-by-month payments to Stahl were to be based. Hence, within the meaning of the statute, the written contract is one ascertaining the sum payable, and interest is allowable on each unpaid sum which was due and payable monthly under the contract. And there is nothing in the contract to alter this legal consequence even though it later developed that Phillips was required to refund to its purchasers a portion of the purchase price it has received.' 550 S.W.2d at 366-67." 569 S.W.2d at 484.

Next, Phillips makes the same argument that because Phillips was a *purchaser*, it cannot be held liable for interest. This time Phillips relies on *Tara Petroleum Corp. v. Hughey*, 630 P.2d 1269 (Okla. 1981). There,

Tara, the lessee, assigned the lease to Brown, who assigned it to Wilcoy. Wilcoy, as producer and seller, entered into a gas purchase contract with Jarrett Oil Company, buyer. Although the contract required Wilcoy to pay royalties, Jarrett made the actual royalty payments. Jarrett then turned around and sold the gas to El Paso Natural Gas under a contract which allowed Jarrett to get the FPC ceiling price. Jarrett was selling the gas at a higher price to El Paso than the price it was paying Wilcoy. The royalty owners sued for additional royalties, arguing their royalties should be measured by the price El Paso paid Jarrett, rather than the contract price Jarrett paid Wilcoy. The court ruled that as long as the contract between Jarrett and Wilcoy was reasonable when entered into, Wilcoy was not responsible for the additional royalties. The court also stated that neither Jarrett nor Tara was responsible for the additional royalties because, when the producer is not responsible for the additional royalties, the lessors are not entitled to additional royalties from any other party. The royalty owners argued under equity that Tara and Jarrett should not profit to the detriment of the royalty owners, asserting the two organizations were owned by the same men. The court stated that "[w]henever a lessee or assignee is paying royalty on one price, but on resale *a related entity* is obtaining a higher price, the lessors are entitled to their royalty share of the higher price. The key is common control of the two entities." (Emphasis added.) 630 P.2d at 1275. However, the royalty owners failed to show the common control and were denied the additional royalties.

In the above case, the producers were not liable for the additional royalties because the gas purchase contract they had entered into with Jarrett was reasonable. And, because the producers were not liable, the purchaser, Jarrett, was not liable. Here, in the instant case, are the producers liable to the royalty owners? If yes, then the purchaser would also be liable. Under the cas-

inghead gas contract, the producer/seller had an agreement with Phillips, as purchaser, that the price paid by Phillips to the producer was set out in the "sales contract." The casinghead gas contract included the "without interest" clause previously referred to in this opinion. In that clause, it is noted that the price Phillips receives is subject to FPC regulation. On this point the Oklahoma Supreme Court would undoubtedly follow Texas and hold the gas purchase contract was subject to valid federal laws and regulations. *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480.

Next, Phillips argues that under Okla. Stat. tit. 15, § 264A (1981), which defines interests as "the compensation allowed for the use or forbearance or detention of money, or its equivalent," Phillips cannot be liable for interest. This argument has been previously discussed. Phillips contends that a significant amount of gas produced or purchased by Phillips was *used* by Phillips and, as a user, Phillips was not holding money belonging to someone else. For the reasons previously discussed, this argument is without merit.

Finally, Phillips argues that under Okla. Stat. tit. 23, § 8 (1981), Phillips is not liable for interest. That statute provides "[a]ccepting payment of the whole principal, as such, waives all claim to interest." Phillips contends that, because the royalty owners accepted the principal amounts due as a result of the FPC order, they are prevented from seeking interest. Phillips relies on *Webster Drilling Co. v. Sterling Oil of Oklahoma, Inc.*, 376 P.2d 236 (Okla. 1962). There, Webster drilled an oil well for Sterling and billed Sterling. Sterling made partial payments, leaving $12,000 unpaid. Over a year after the sum was due, Webster sent Sterling a bill for the $12,000 plus interest. A year later, Sterling paid the $12,000 and Webster sued to recover the interest. Webster asserted it was an accepted custom in the industry that amounts due under contracts would bear interest at

the rate of six percent until paid. Webster was suing to recover money which Sterling had agreed to pay. Webster was not seeking interest as damages for the breach of an obligation to pay money. The court ruled Webster's cause of action was not an action for interest, but was for an "account stated" (defined as arising "where there have been transactions between debtor and creditor resulting in the creation of matured debts and the parties by agreement compute a balance which the debtor promises to pay and the creditor promises to accept in full payment for the items of the account," Black's Law Dictionary 17 [5th ed. 1979]). Therefore, Webster's suit was based upon a new and independent obligation which rested upon the new agreement of the parties, express or implied, that Sterling would pay Webster the $12,000 plus interest. Thus, Okla. Stat. tit. 23, § 8 (1981) did not bar Webster's suit.

Here, Phillips agreed in its corporate undertaking with the FPC that it would comply with the requirements of 18 C.F.R. § 154.102 (1986), which sets for the applicable rates of interest refundable monies held in suspense. Additionally, it is noted that in the indemnity agreements Phillips offered to its royalty owners and producers this requirement under the corporate undertaking is mentioned:

> "From time to time and by various orders issued since June 7, 1954, the Federal Power Commission (FPC) has suspended increases in price for sales of gas filed by Phillips and has permitted such increases to be collected, beginning at some date subsequent to the original date proposed by Phillips, *only upon Phillips filing a corporate undertaking with the FPC to refund all or any portion of such increase which the FPC may find not to have been justified, together with interest at the rate prescribed by the FPC.* It is expected that future increase in price for the sale of gas may also be suspended and

> collection of such increases permitted only upon Phillips filing a similar undertaking." (Emphasis added.)

The Oklahoma courts would probably view the above as similar to an industry practice whereby a new obligation is created at the time of payment, similar to the circumstances in *Webster*, and Okla. Stat. tit. 23, § 8 (1981) would not bar recovery by the royalty owners.

Furthermore, Oklahoma has adopted the United States rule, discussed more fully later in this opinion, on partial payment of an interest-bearing debt. *Landess v. State*, 335 P.2d 1077, 1079 (Okla. 1958).

To summarize, the Oklahoma courts have not ruled on the issues presented in this case. However, the Oklahoma Court of Appeals has recognized that the function of interest is to compensate another for the use of his money, and the Fifth Circuit has awarded prejudgment interest where one party has had the use of another's money. Prejudgment interest, by statute, is awarded where the damages are certain or are ascertainable by mere calculation, as here.

INTEREST RATE

Okla. Stat. tit. 15, § 266 (1981) provides as follows:

> "The legal rate of interest shall be six percent (6%) in the absence of any contracts as to the rate of interest, and by contract the parties may agree to any rate as may be authorized by law, now in effect or hereinafter enacted."

In the above cases where interest was awarded, the applicable rate was six percent. However, in *First Nat. Bank v. Cit. & So. Bank*, 651 F.2d 696 (10th Cir. 1981), applying Oklahoma law, a federal circuit court awarded interest at the rate of ten percent as provided in the promissory note and rejected the argument that the in-

terest must be limited to Oklahoma's legal rate of six percent. Therefore, in equity, the corporate undertaking entered into by Phillips and the FPC would probably be viewed by implication as contractual by the Oklahoma courts and the rates required in 18 C.F.R. § 154.102 (1986) would be imposed, rather than the statutory six percent.

LOUISIANA

LIABILITY

Phillips relies on *Whitehall Oil Company v. Boagni*, 217 So. 2d 707 (La. App. 1968), *modified* 217 So. 2d 716 (1969) (party substituted), to support its argument that under Louisiana law Phillips is not liable for interest. There, the lessees of oil and gas leases were granted authority by the FPC to sell gas to pipeline purchasers at a price of 23.25 cents per 1,000 cubic feet (Mcf). This was conditioned on the lessees' agreement to refund to the pipeline purchasers any difference between the 23.25 cents price and the price finally approved by the FPC, plus seven percent interest. The lessee (plaintiff Whitehall) paid royalties to the lessors (defendants royalty owners) based upon this higher rate of 23.25 cents per Mcf. The lessors were never informed, however, that if the FPC denied the rate increase, the royalty owners would be required to refund to the lessee the difference between the 23.25 cents and the price approved.

The FPC approved a price at 20 cents per Mcf. The lessee then refunded the difference to the pipeline purchasers and demanded reimbursement from the royalty owners. The royalty owners refused to pay and the lessee filed suit relying on the equitable principles of unjust enrichment and a code provision dealing with "Payment of a Thing Not Due." La. Civ. Code Ann. art. 2301 (West 1979). Under the statute, if the payments to the royalty owners were not due under the lease agreement, Whitehall could recover the overpayment. It was found

that the payments were not due. As to the equity argument, Whitehall argued it had to make the overpayment of royalties based on the price fixed by the FPC in order to protect its leases. Therefore, it argued, as the payments were made under business duress, the royalty owners should not be allowed to retain them under principles of equity. The Court of Appeals ruled that equity favored Whitehall. The court noted the overpayments were not large sums, and defendants had failed to show how they would be injured by their refund. Whitehall also argued it was entitled to a refund of both principal and interest which it had to pay to the *pipeline purchaser.* The court denied such interest without much comment. The court also rejected the lessors' argument that forcing them to refund the overpayment to Whitehall resulted in the price being uncertain and violated the lease. The court ruled the action was based on a quasi-contractual obligation, *i.e.*, that a payment made which was not due can be recovered based upon the rationale that every payment presupposes a debt. Post-judgment interest was awarded to Whitehall, although the opinion does not indicate the interest rate.

The Louisiana Supreme Court granted certiorari in *Whitehall Oil Company v. Boagni,* 255 La. 67, 229 So. 2d 702 (1969). Responding to the lessors' arguments that the statutory provisions of "Payment of a Thing Not Due" were inapplicable, the court stated that, because the lease contract was silent on the issue of overpayments, *equity would decide the case.* 255 La. at 73-74. It was stated the royalty owners would be unjustly enriched at the expense of Whitehall if they were allowed to retain the overpayments. The court ruled Whitehall had no obligation to withhold part of the payments, or place the amounts in escrow, or file a concursus proceeding because "the proper amounts to be paid by [Whitehall] to the [royalty owners] *was not known and could not be determined* until such time as the Commission fixed the fair market value in its permanent rate authorization."

255 La. at 76. Phillips argues that here, as above, the amount in question is not certain until final approval by the FPC and, therefore, Phillips is not liable for interest.

Louisiana law is confusing on this issue. *Hicks v. Rucker Pharmacal Co., Inc.*, 367 So. 2d 399 (La. App. 1978), *writ denied* 369 So. 2d 1360 (La. 1979), relied on by Phillips, stated that all debts bear interest from the time they become due; an unliquidated claim, however, becomes due at the time it is ascertainable.

In *Wurzlow v. Placid Oil Company*, 279 So. 2d 749 (La. App. 1973), interest was allowed on an unliquidated claim from the date the defendant received the funds, rather than from the date of judgment (the ascertainable date). There, a declaratory action was brought by an oil and gas broker and his assignees to be recognized as owners of an overriding royalty interest. The court reviewed Louisiana law regarding interest on unliquidated debts and noted a Louisiana Supreme Court case which had reviewed the statutory changes and had stated:

> "'*It is obvious that both changes indicate an intention that interest shall be allowed on unliquidated, as well as on liquidated, claims, and that interest shall commence to run at the time the debt due, regardless of putting in default.*'" (Emphasis in original.) 279 So.2d at 773 (quoting *Friede v. Myles Salt Co.*, 177 So. 105 [La. App. 1937]).

Therefore, in Louisiana, interest does run on an unliquidated debt once the debt is ascertainable.

Phillips also relies on *Alexander v. Burroughs Corp.*, 359 So. 2d 607 (La. 1978), for the proposition that interest on a debt becomes due and payable only on the date it becomes liquid and ascertainable. *Alexander* involved a redhibitory action. Peerless, a company, had purchased a computer from Burroughs. The purchase was financed by General Electric Credit Corporation

(GECC). The computer never operated properly and cost Peerless a substantial amount of money and time because employees had to doube-check the computer's work. One of the items the receiver of Peerless sought to recover (Peerless had declared bankruptcy) was the finance charge of $5,100 Peerless had paid on the $17,000 loan from GECC. The Louisiana Court of Appeals ruled that the $5,100 was not recoverable because, under the transaction, Burroughs got the use of the purchase price at the same time that Peerless got the use of the computer. The Louisiana Supreme Court, however, disagreed and found that Burroughs was liable for the $5,100 "interest" because the use of the computer did not bring any value to Peerless.

Certain language in *Alexander* has been questioned. There, it was stated:

> "The decisions involving interest on sums recovered by suit are naturally myriad and because of their great number, if for no other reason, inconsistent. There is, however, a thread of consistency among the cases. Article 554, of the Louisiana Code of Practice of 1825 provided that interest should not run on accounts or unliquidated claims, but was repealed by La. Acts 1839, No. 53 § 1. This Court once commented,
>
> " 'We have uniformly held that, since the passage of that act, all sums due on contracts bear interest *from judicial demand*, even where none has been stipulated, and the demand is unliquidated.' *Sullivan v. Williams*, 2 La. Ann. 876, 878 (1847).
>
> See also *Petrie v. Wofford*, 3 La. Ann. 562 (1848); *Calhoun v. Louisiana Materials Co.*, 206 So. 2d 147, 151-52 (4th Cir. 1968), writ denied, 251 La. 1050, 208 So. 2d 324 (1968); *Friede v. Myles Salt Co.*, 177 So. 105, 108 (Orl. La. App. 1937)." (Emphasis added.) 359 So. 2d at 613.

The later case of *Meeks v. Huntington School, Inc.*, 489 So. 2d 435 (La. App. 1986), questioning the above language, involved La. Civ. Code Ann. art 2000 (West 1987 Supp.), which replaced La. Civ. Code Ann. art. 1938 (West 1977). The new statute provided:

> "When the object of the performance is a sum of money, damages for delay in performance are measured by the interest on that sum *from the time it is due*, at the rate agreed by the parties or, in the absence of agreement, at the rate of twelve percent per annum." (Emphasis added.)

The question was whether the interest ran from the due date or the date of judgment. The court did not agree with the above-cited passage from *Alexander* that interest ran from the date of judicial demand, and it distinguished *Alexander* on the basis that it was a redhibitory action, while the case before it was a contract case. In *Meeks*, a former principal sued the school to recover salary due under his contract. No argument was made that the amount was unliquidated. Meeks recovered legal interest on each salary payment as it became due, rather than from the date of judicial demand.

Next, Phillips argues *Boutte v. Chevron Oil Company*, 316 F. Supp. 524 (E.D. La. 1970), *aff'd* 442 F.2d 1337 (5th Cir. 1971), is contrary to *Whitehall*. In *Boutte*, lessors filed a class action suit to set aside a mineral lease held by Chevron. One of the reasons to set aside the lease, asserted by the lessors, was that Chevron had failed to pay royalties as required by the lease. In its findings of fact the court stated:

> "Chevron applied to the FPC for approval of an increased rate of 23.675 cents and, on June 4, 1959, the FPC entered an order permitting the increased rate to become effective April 1, 1959, without, however, approving the rate, and subject to the limitation that

> " 'Chevron shall, in accordance with its agreement and undertaking, refund at such time and in such amounts to the parties entitled thereto, and in such manner as may be required by final order of the Commission, the portion of the increased rates found by the Commission in this proceeding not justified, *together with interest thereon.*' " (Emphasis in original.) 316 F. Supp. at 527.

Chevron withheld royalties on the increased prices it was receiving pending final FPC approval. This suit was filed prior to, and the case was heard prior to, FPC final approval of rate increases requested by Chevron.

In its conclusions of law, the court ruled Chevron's royalties calculations were correct, *i.e.*, the royalties were calculated by not including the increased prices received by Chevron pending FPC approval. The court stated:

> "A judgment which would impose on Chevron an obligation to pay royalties on that part of the funds received from the sale of gas which is subject to possible refund to pipeline purchasers, before Chevron's refund obligation has been determined by final order of the FPC, would deprive Chevron of its property without due process of law and subject it to a multiplicity of legal actions. Therefore, Chevron's calculation of the payment of royalties to plaintiffs is correct.
>
> "Whitehall Oil Co. v. Boagni is distinguishable on its facts, particularly in view of the fact that the lease in that case provided that:
>
> " 'In any case where Lessee sells gas or plant products of his and Lessor's, Lessor shall receive the same price and terms as Lessee . . . .' " 316 F. Supp. at 531.

It is important to note that the court stated that *if* the FPC granted approval, the royalty owners were entitled to recover interest as set forth by the FPC:

> "In the event that the FPC approves the provisionally increased rates or any part thereof, *interest shall be due and payable, at the rate finally adopted by the FPC*, to the royalty owners on the difference between any increase in rate, as finally determined by the FPC, and the amounts previously paid to the royalty owners." (Emphasis added.) 316 F. Supp. at 531.

Whitehall and *Boutte* are not contrary in law, but are distinguishable upon their facts. In *Whitehall*, the lessee paid royalties based upon the *increased* rate pending FPC approval as was required in the lease while in *Boutte*, the lessee did not pay royalties upon the increased rate but was withholding royalties until final FPC approval. In *Boute*, the federal court found that once final approval of the FPC order was granted, interest would be due. In *Whitehall*, the state court found that no interest was due because the amount due was not ascertainable until the FPC gave final approval.

Thus, it appears first that if the royalty owners were required under equity to refund overpayments in *Whitehall*, that same rationale applied here would require Phillips to refund the suspense royalties to the royalty owners and producers involved. The court also found it significant to note in *Whitehall* that the amounts of the refunds were relatively small. Here, the refunds held by Phillips are substantial. Second, the statement in *Whitehall* that no interest would be awarded on unliquidated claims is no longer the law. Interest is due at the time the unliquidated amount becomes ascertainable. *Hicks v. Rucker Pharmacal Co., Inc.*, 367 So. 2d 399. Third, in *Alexander*, interest was awarded to compensate one for another's use of his money. And fourth, although dicta, the court in *Boutte v. Chevron Oil Company*, 316

F. Supp. 524, recognized the royalty owners' right to interest on suspended royalties under federal regulations.

Next, Phillips again argues that as a *purchaser* of gas, it is not liable for interest. The case relied on by Phillips is *New Orleans Public Service v. United Gas Pipe Line*, 732 F.2d 452 (5th Cir.), *cert. denied* 469 U.S. 1019 (1984), where it is stated that, under Louisiana law, to have a *stipulation pour autrui* (a third party beneficiary contract), there must be a benefit to a third party and that benefit cannot be merely incidental to the contract. The benefit must form the condition or consideration of the contract. 732 F.2d at 467.

As to the contract between Phillips, as purchaser, and the producers, whereby Phillips agrees to pay royalties as the producers direct, Phillips relies on the following language from that case:

> "Where the promisor's performance is to be made to, and is subject to the control of, the promisee, the Louisiana courts have refused to find a *stipulation pour autrui* despite the fact that the promisor and promisee may have contemplated that the promisor's performance would as a practical matter enable or facilitate the promisee's performance of its obligations to a third party. See *Fontenot v. Marquette Casualty Co.*, 258 La. 671, 247 So. 2d 572, 579 (1971) (reinsurance contract); *Oswalt v. Irby Const. Co.*, 424 So. 2d 348, 354 (La. App. 1982) (agreement of grantee in right-of-way deed, where grantor reserved right to grow crops in right-of-way, to pay grantor for any future damage to crops on submittal of bill by grantor, was not *stipulation pour autrui* in favor of grantor's lessee; distinguishing cases in which promisor's agreement to pay is not stated in terms of payment to promise of claims submitted by promisee); *Crowley v. Hermitage Health and Life Ins. Co.*, 391 So. 2d 53 (La. App. 1980) (health and accident insurance policy in which em-

> ployer is insured, providing for benefits in the event of employee work-related injury to be paid to employer or persons furnishing services to employees, is not *stipulation pour autrui* in favor of employee injured on job). Even when the payments may be directly to the third party, but require the claim of the promisee, a *stipulation pour autrui* has not been found. *Logan v. Hollier*, 424 So. 2d 1279, 1282 (La. App. 1982); *Logan v. Hollier*, 699 F.2d 758, 759 (5th Cir. 1983) (per curiam)." 732 F.2d at 468-69.

We find that, under Louisiana law, the *corporate undertaking* between Phillips and the FPC would be viewed as a *stipulation pour autrui.* In order for Phillips to receive the increased prices, pending FPC approval, Phillips, as consideration, agreed to comply with 18 C.F.R. § 154.102, which sets the applicable interest rates applying equitable principles. The royalty owners and producers would benefit from the agreement.

Next, Phillips cites *Star Elec. Supply v. Fidelity & Deposit Co.*, 354 So. 2d 647 (La. App. 1977), *writ denied*, 356 So. 2d 1011 (La. 1978), and *Waguespack Pratt, Inc. v. de Salvo*, 225 So. 2d 269 (La. App. 1969), *writ refused* 254 La. 846 (1969), for the proposition that Louisiana law would not impose liability upon a person for holding the funds belonging to another. These two cases were concursus proceedings, a form of interpleader action in Louisiana. In both cases, *the money had been deposited into court* and the owner of the money was in dispute. The court ruled the interpleader could not safely pay the money to either party and denied interest on the amount in dispute.

Those cases must be distinguished because here, Phillips did not deposit the money into court and could have paid the suspense royalties to the royalty owners pending FPC approval. The cause of action here is based in contract and, under *Whitehall Oil Company v. Boagni*,

255 La. 67, when the contract is silent concerning the issue in dispute, *equity decides the case.*

Next, Phillips cites *Smith v. Burden Const. Co.*, 379 So. 2d 1135 (La. App. 1980), for the proposition that under Louisiana law there is no legal basis for the recovery of interest as an item of damage. There, an employee's fraud scheme was discovered and the company fired him. The employee sued the company for unpaid wages and vacation pay. The company brought a reconventional demand for losses and expenses incurred by the employee's fraud. One of the company's claims for damages was eleven percent interest. The court stated "[t]here is no legal basis for the recovery of interest as an item of damage." 379 So. 2d at 1138.

Smith, however, did not involve an action based on contract. It is important to note that former La. Civ. Code Ann. art. 1938 (West 1977), stated that "[a]ll debts shall bear interest at the rate of seven percent per annum from the time they become due, unless otherwise stipulated." Thus, the statement from *Smith* is misleading.

INTEREST RATE

As previously stated, La. Civ. Code Ann. art. 1938 (West 1977) provided for a legal rate of interest of seven percent on all debts from the time they become due, unless the parties have stipulated otherwise. That statute was replaced with La. Civ. Code Ann. art. 2000 (West 1987 Supp.) which provides for twelve percent interest, effective January 1, 1985. In *Silver v. Nelson*, 610 F. Supp. 505 (E.D. La. 1985), twelve percent interest was assessed as that was the rate in effect at the time the obligation matured, even though the seven percent rate of interest was in effect at the time of the judicial demand. Phillips argues that if it is liable for interest under Louisiana law, the rate of seven percent controls rather than the rates required by 18 C.F.R. § 154.102(c) (1986), which provides:

"*Refunds.* (1) Any independent producer that collects rates and charges pursuant to this section shall refund at such times, in such amounts to the persons entitled thereto and in such manner as may be required by final order of the Commission the portion of any increased rates or charges found by the Commission in that proceeding not be justified, together with interest thereon as required in paragraph (c) (2) of this section.

"(2) Interest shall be computed from the date of collection until refunds are made as follows:

"(i) At a rate of seven percent simple interest per annum on all excessive rates or charges held prior to October 10, 1974;

"(ii) At a nine percent simple interest per annum on all excessive rates or charges held between October 10, 1974, and September 30, 1979; and

"(iii) (A) At an average prime rate for each calendar quarter on all excessive rates or charges held (including all interest applicable to such rates or charges) on or after October 1, 1979. . . .

"(B) The interest required to be paid under paragraph (c) (2) (iii) (A) of this section shall be compounded quarterly."

As stated above, these rates run *from the date of collection until the refunds are made.*

Again, in *Boutte v. Chevron Oil Company,* 316 F. Supp. at 531, a Louisiana federal district court stated in dictum that if the FPC granted approval of all or a portion of the price increases requested by Chevron, interest would be due and payable *on the suspended royalties* held by Chevron at the rates established by the FPC. These rates were questioned by an oil company in *United Gas Pipe Line v. Federal Energy Reg. Com'n,* 657 F.2d 790 (5th Cir. 1981). In particular, the average prime

rate of interest was challenged, as was the compounding of interest provision. The pipeline company argued it should not have to pay interest on the entire amount of the refund because it did not have use of all the monies subject to refund due to the company's tax obligations. The court stated:

> "The problem arises because the Treasury has the use of part of the collection while the Commission decides whether the rates are reasonable. A question arises as to who should pay the time-cost of that money while the Commission makes its decision—the filing company or its customers?
>
> "It follows from what was said before that the burden should be on the company. When a gas company accepts money subject to refund it becomes a stakeholder, and the Commission then determines who owns the stakes. Interest can be required only when it is determined that the money belongs to the consumers. As between passive consumers and active sellers, there seems to be no reason to place this burden on the eventual user, so the Commission's decision in that respect is certainly reasonable. While the result we reach does not depend on it, we agree with the Commission's conclusion that gas companies can avoid this expense by acting prudently in submitting rate requests. We reject the petitioners' suggestion that this is an inappropriate consideration. On the contrary, Congress proscribed even a demand for unreasonable prices, and the return a company earns on unreasonable charges, albeit collected by permission of Congress, cannot control the rate of interest to be paid to consumers." 657 F.2d at 796.

We find Louisiana would apply the FPC rates of interest under equitable principles. *Whitehall Oil Co. v. Boagni*, 225 La. 67. 18 C.F.R. § 154.102 provides interest

runs from the date Phillips collected the funds until it made the refunds.

NEW MEXICO

LIABILITY

New Mexico appellate courts have not been presented a case involving interest liability on suspended royalties. However, in *Shaeffer v. Kelton*, 95 N.M. 182, 619 P.2d 1226 (1980), prejudgment interest was awarded where one party was deprived of the use of his money. A construction contract for the development of property was involved. After the plaintiff had substantially completed the project and was ready to close, the defendant refused to close, saying he wanted out of the deal. The plaintiff sought damages, not based on the contract, but in the form of interest accruing daily on the amount owed to him. The trial court denied the plaintiff interest and the Supreme Court of New Mexico reversed, stating:

> "In this case, the plaintiff has not only been unable to discharge a sizeable construction loan, but he has also been forced to make costly interest payments while attempting to locate another willing buyer. *In addition, he has lost the use and earning power of $17,000 of his own funds used to finance the project. Simple interest is allowed as a means of estimating these probable gains and as compensation for their prevention.*" (Emphasis added.) 95 N.M. at 187.

The New Mexico court has ruled that the statute allowing interest at six percent is construed according to the Restatement of Contract § 337 (1932):

> "In New Mexico, the allowance of interest is governed by Section 56-8-3, N.M.S.A. 1978, which provides in part that:
>
> "The rate of interest, in the absence of written contract fixing a different rate, shall be six percent per annum, in the following cases:

"A. on money due by contract;

"B. on judgments and decrees for the payment of money when no other rate is expressed.

This Court indicated in *O'Meara v. Commercial Insurance Company*, 71 N.M. 145, 376 P.2d 486 (1962), that the New Mexico statute should be construed according to Restatement, Contracts § 337 (1932), wherein the rule is stated as follows:

> "If the parties have not by contract determined otherwise, simple interest at the statutory legal rate is recoverable as damages for breach of contract as follows:
>
> "(a) Where the defendant commits a breach of a contract to pay a definite sum of money, or to render a performance the value of which in money is stated in the contract or is 'ascertainable by mathematical calculation from a standard fixed in the contract or from established market prices of the subject matter, interest is allowed on the amount of the debt or money value from the time performance was due, after making all the deductions to which the defendant may be entitled.
>
> "(b) Where the contract that is broken is of a kind not specified in Clause (a), interest may be allowed in the discretion of the court, if justice requires it, on the amount that would have been just compensation if it had been paid when performance was due.

"In previous cases, where the amount of damages was not fixed or determinable, this Court applied the rule of subsection (b) and held that the allowance of interest was not mandatory but should be left to the discretion of the trial court." 95 N.M. at 187.

Thus, according to New Mexico law, if the amount involved is not ascertainable under subsection (a) above, then, under subsection (b), the trial court may still award prejudgment interest in the exercise of its discretion. See *Navajo Tribe v. Bank of New Mexico*, 700 F.2d 1285 (10th Cir.1983) (the award of prejudgment interest is a question of law solely within the sound discretion of the court). Interest is allowable on unliquidated claims which can be calculated, even though the claim is disputed. *Fanderlik-Locke Co. v. United States*, 285 F.2d 939, 948 (10th Cir. 1960).

Again, Phillips argues that a *purchaser* it is not liable for interest and relies on *Western Farm Bureau Mutual Ins. Co. v. Barela*, 79 N.M. 149, 441 P.2d 47 (1968). This case does not support Phillips' position. The argument that Phillips is a purchaser and therefore owes no interest has no merit for reasons heretofore stated.

WYOMING

LIABILITY

There is no Wyoming case law concerning liability for interest on suspended royalties. Phillips relies on *Rissler & McMurray Co. v. Atlantic Richfield Co.*, 559 P.2d 25 (Wyo. 1977), for its argument that, because the amount in question here is unascertainable until the final FPC order, under Wyoming law, no prejudgment interest can be awarded. That case involved a construction contract dispute where the trial court denied prejudgment interest to the prevailing party. The Supreme Court of Wyoming reviewed the history of the statutes authorizing interest in cases where contracts make no such provision. The court noted that, first, interest is recoverable on liquidated claims; however, interest on unliquidated claims is not recoverable until the claim is "readly computable by simple mathematical computation." Second, the court stated the statutory interest rate is "adopted only as a convenient measure of damage for loss of use of money

and recognizes the legislative view that money has value beyond its intrinsic worth." 559 P.2d at 31. (See also *Western Plains Service v. Ponderosa Development*, 769 F.2d 654 [10th Cir. 1985], stating interest is compensation for use of money.) Ruling that the plaintiff was entitled to recover prejudgment interest, the Wyoming court stated the following:

> "Rissler was entitled to the use of money which it had earned on its contract with ARCO from the date it became due; its cause of action accrued at that time. Rissler was also entitled to the use of money to which it is entitled from Certified from the date it became due. *The use of money has real economic value of which Rissler has been deprived. Money has the ability to reproduce in terms of earning interest.* Withholding interest when inappropriate causes the loss of use of a contractor's capital. Interest is a fact of commercial life. In that sense, *prejudgment interest is necessary to compensate the plaintiff, not only for the amount by which it has suffered damages in the usual sense for breach of contract but also for the loss of use of the money to which it is entitled. ARCO and Certified have gained the use of money which Rissler has lost and to that extent have been unjustly enriched.*" (Emphasis added.) 559 P.2d at 32.

The court then ruled that the claim involved was a liquidated claim. The defendant was aware of the plaintiff's prices for paving—$1.75 per square yard, three inches thick—and the contract even included that unit standard. The court stated, "Where there is a standard fixed in the contract, from which the amount earned may be computed, there is a liquidated figure, which should bear interest from the date due." 559 P.2d at 33. The court cautioned, however, that before interest starts to run, the debtor must receive notice of the amount due. 559 P.2d at 34.

Applying these principles to the case before us, we first note that Wyoming would likely recognize Phillips' liability for interest under equitable principles on the use of the money belonging to the royalty owners. However, there are two other conditions to bet met: (1) The claim must be liquidated, or if unliquidated, ascertainable by mere mathematical calculation; and (2) Phillips ordinarily should receive notice for the amount due from the royalty owners.

As previously discussed, the Texas courts have rejected the argument that the amount involved here is not ascertainable, but there is no Wyoming case on point. The requirement that the debtor receive notice of the amount due before interest starts to run seems impractical in the situation before us. Here, it is Phillips, the debtor, that notifies the royalty owners it is keeping a portion of their royalties. Those royalties are computed by Phillips and involve a detailed computation not available to the royalty owners. The average royalty owner would find it difficult to arrive mathematically at the sum he or she is owed by Phillips in order to give proper notice. Equitable considerations applied by Wyoming to the facts in this case would not require notice by the royalty owners to Phillips of the amount due.

Next, Phillips argues again that as a *purchaser* it cannot be held liable for interest because the royalty owners were not parties to the casinghead gas contracts, nor were they third party beneficiaries under these contracts. Phillips relies on *Larsen Sheep Co. v. Sjogren*, 67 Wyo. 447, 226 P.2d 177 (1951), where a partnership sued for specific performance of a contract to convey certain real estate pursuant to an option contained in a lease. The original partnership of three people dissolved and a new partnership consisting of two of the original three partners was formed. The dissolution agreement provided for the lease in question to be assigned to the partner who was leaving. The assignment was never completed; how-

ever, the dissolution agreement was orally modified and the old partnership retained the lease. The defendants complained that the written dissolution agreement controlled, but the court rejected that argument, stating:

> "As stated in Williams vs. Eggleston, 170 U.S. 304, 18 S. Ct. 617, 619, 42 L. Ed. 1047: 'The parties to a contract are the ones to complain of a breach, and if they are satisfied with the disposition which has been made of it and of all claims under it, a third party has no right to insist that it has been broken.' " 67 Wyo. at 472.

This case involving a partnership dissolution agreement is easily distinguishable from the instant case involving an oil and gas transaction which involves many different parties, and where one party, in fact, can wear many hats. (Phillips is a producer, distributor, and user of gas.) The royalty owners here are not insisting that the contracts made between Phillips and the producers be broken. They merely want to recover from Phillips interest for the use of their suspended royalties held by Phillips as stakeholder and used by Phillips in its business.

INTEREST RATE

Wyo. Stat. Ann. § 40-14-106(e) (1977) provides for a seven percent interest rate if no agreement or statute provides for a different rate. The rate of seven percent was imposed in *Rissler & McMurray Co. v. Atlantic Richfield Co.*, 559 P.2d 25, discussed above.

There is no Wyoming case law to indicate whether the Wyoming courts would recognize the corporate undertaking filed by Phillips with the FPC and impose those rates rather than the rate of seven percent. Under equitable principles, however, Wyoming would look to the law of other states and would apply the FPC rates.

In conclusion, Phillips has not briefed the conflict of laws issue for any jurisdictions other than Texas, Okla-

homa, Louisiana, New Mexico, and Wyoming. We construe this to be an abandonment of any claim of error regarding jurisdictions other than the five states enumerated. Accordingly, Kansas law will be construed as applying to the disposition of all jurisdictions other than the five states enumerated.

Five of the six states involved have adopted the United States rule, Wyoming being the one state that has no law on this point. See *Jones v. Nossaman*, 114 Kan. 886, 894, 221 Pac. 271 (1923); *Lambert v. Cronvich*, 373 So. 2d 554, 562 (La. App. 1979); *Savage v. Howell*, 45 N.M. 527, 533, 118 P.2d 1113 (1941); *Landess v. State*, 335 P.2d 1077, 1079 (Okla. 1958); *Community Savings and Loan Association v. Fisher*, 409 S.W.2d 546, 550 (Tex. 1966). According to the United States rule, *in the absence of an agreement* or a statute to the contrary, partial payments to an interest-bearing debt which is due are first applied to the interest due. If the payment exceeds the interest, the surplus goes toward discharging the principal, and the subsequent interest is computed on the remaining principal due. If the payment does not discharge the interest that is due, the balance of interest is not generally added to the principal so as to produce interest. Rather, the interest continues on the former principal until the period when the payments, taken together, exceed the interest due. Then the surplus is applied toward discharging the principal, and the subsequent interest is computed on the remaining principal due. See 45 Am. Jur. 2d, Interest and Usury § 99.

The United States Supreme Court, in remanding this case to Kansas for further consideration in accordance with the law stated therein, has recognized the salient facts controlling this class action as follows:

> "Because petitioner sold the gas to its customers in interstate commerce, it was required to secure approval for price increases from what was then the Federal Power Commission, and is now the Federal

Energy Regulatory Commission. Under its regulations the Federal Power Commission permitted petitioner to propose and collect tentative higher gas prices, subject to final approval by the Commission. If the Commission eventually denied petitioner's proposed price increase or reduced the proposed increase, petitioner would have to refund to its customers the difference between the approved price and the higher price charged, plus interest at a rate set by statute. See 18 CFR § 154.102 (1984).

"Although petitioner received higher gas prices pending review by the Commission, petitioner suspended any increase in royalties paid to the royalty owners because the higher price could be subject to recoupment by petitioner's customers. Petitioner agreed to pay the higher royalty *only if the royalty owners would provide petitioner with a bond or indemnity for the increase, plus interest, in case the price increase was not ultimately approved and a refund was due to the customers. Petitioner set the interest rate on the indemnity agreements at the same interest rate the Commission would have required petitioner to refund to its customers.* A small percentage of the royalty owners provided this indemnity and received royalties immediately from the interim price increases; these royalty owners are unimportant to this case.

"The remaining royalty owners received no royalty on the unapproved portion of the prices until the Federal Power Commission approval of those prices became final. Royalties on the unapproved portion of the gas were suspended three times by petitioner, corresponding to its three proposed price increases in the mid-1970's. In three written opinions the Commission approved all of petitioner's tentative price increases, so petitioner paid to its royalty owners the suspended royalties of $3.7 million in

> 1976, $4.7 million in 1977, and $2.9 million in 1978. *Petitioner paid no interest to the royalty owners although it had the use of the suspended royalty money for a number of years.*" (Emphasis added.) *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 799-800, 86 L. Ed. 2d 628, 105 S. Ct. 2965 (1985).

These suspense royalties withheld by Phillips could in no event be retained by Phillips because under federal law it was merely a stakeholder of these funds until the FPC issued its final rulings on Phillips' application for price increases. Then the funds would be distributed either to Phillips' purchasers, from whom Phillips collected the increased price pending FPC approval *together with interest* in accordance with its corporate undertaking in compliance with federal regulations, if a refund was requested, or to the royalty owners. Had the royalty owners complied with *all conditions imposed by Phillips*, they could have received the increased royalty pending FPC approval but *only if* they agreed to pay interest in accordance with the amount specified by the federal regulations if Phillips' price increase was not approved.

After reviewing the law of the five enumerated states in accordance with the proper due process constitutional standard, we find all of the five states enumerated would find interest payable when the FPC approved the various rate increases because the amount due the royalty owners was then ascertainable or capable of calculation from the facts then available to Phillips.

The *amount* of interest payable on the royalties held in suspense which were not paid to the royalty owners, when the FPC approved Phillips' rate increases, is the only remaining issue presented by this litigation on remand.

Based upon the law of the five enumerated jurisdictions as above reviewed, and up all of the facts, conditions, and circumstances presented by this case, we find all jurisdictions would apply equitable principles of unjust en-

richment to hold Phillips liable for interest on the royalties held in suspense by Phillips as a stakeholder. Under equitable principles, the states would imply an agreement binding Phillips to pay the funds held in suspense to the royalty owners when the FPC approved the respective rate increases sought by Phillips, together with interest at the rates and in accordance with the FPC regulations found in 18 C.F.R. § 154.102 (1986) to the time of judgment herein. These funds held by Phillips as stakeholder originated in federal law and are thoroughly permeated with interest fixed by federal law in the FPC regulations as heretofore set forth in this opinion.

POST-JUDGMENT INTEREST

When was judgment entered in this case?

Here, the original judgment against Phillips was entered by the district court on May 20, 1983. That decision was affirmed as modified by this court on March 24, 1984. The district court had awarded post-judgment interest at the rate of the average prime rate pursuant to FPC regulations. That award of post-judgment interest was modified by this court to the statutory rate of fifteen percent from the date of judgment until paid. On June 26, 1985, the United States Supreme Court reversed and remanded the holding of this court in *Shutts II* concerning the choice of law issue. On our remand of this case to the district court for compliance with the United States Supreme Court decision, the district court ruled on April 30, 1986, that Phillips was liable for prejudgment interest on the suspended royalties at the FPC rates up to the time of judgment, and post-judgment interest at fifteen percent on the judgment until paid.

Phillips argues if post-judgment interest is awarded, it should run from April 30, 1986, the date of the new judgment, rather than May 20, 1983, the date of the original judgment.

In *Lippert v. Angle*, 215 Kan. 626, 527 P.2d 1016 (1974), this court addressed the issue of post-judgment interest on a judgment that had been successfully attacked on appeal. It stated:

> "[W]here the action of the appellate court can be regarded as a full reversal, the action of the appellate court as the effect of wiping out the original judgment and interest on the new judgment then runs only from the time when the amount of the new judgment is fixed." 215 Kan. at 628.

In *First National Bank v. Bankers Dispatch Corporation*, 221 Kan. 528, 537, 562 P.2d 32 (1977), it was stated:

> "Where a money award has been modified on appeal and the only action necessary in the trial court is compliance with the mandate of the appellate court, the majority view is that interest on the award as modified should run from the date of entry of the original judgment. It has been so held regardless of whether the appellate court reduced or increased the original award."

We hold the decision of the United States Supreme Court on the conflict of laws issue constitutes a "full reversal" of the original judgment in this case, which was May 20, 1983. The United States Supreme Court ruled that it was unconstitutional to apply the laws of Kansas to all claims involved. This we construe as vacating the original judgment on the amount of interest due. The Court ruled that on remand the putative conflicts" in laws asserted by Phillips should be addressed by this court.

On our review of the lower court's decision entered on April 30, 1986, we affirm the ruling as to interest payable on royalties held in suspense to the date of judgment, but reverse the ruling insofar as it applied the Kansas post-judgment interest rate to the states of Texas, Oklahoma, Louisiana, New Mexico, and Wyoming.

Our decision herein, modifying the decision of the district court, requires that post-judgment interest be paid from April 30, 1986.

The following shows the five states' statutory post-judgment interest rates, effective on the rate of the new judgment, April 30, 1986, to be applied on remand to the judgment of royalty owners having leases in these states:

Texas:

Tex. Rev. Civ. Stat. Ann. art. 5069-1.05 (Vernon 1987)	18%

Oklahoma:

Okla. Stat. tit. 12 § 727 (1985 Supp.)	15%

Louisiana:

La. Civ. Code Ann. art. 2924 (West 1987 Supp.)	7%

New Mexico:

N.M. Stat. Ann. § 56-8-4 (1986)	15%

Wyoming:

Wyo. Stat. § 1-16-102 (1977)	10%

Accordingly, the interest payable to the royalty owners in this case is the rate of interest set forth in Phillips' corporate undertaking with the FPC from the time Phillips first began holding royalties in suspense to the date of judgment entered by the district court, April 30, 1986, and post-judgment interest for royalty owners having leases in Texas, Oklahoma, Louisiana, New Mexico, and Wyoming at the statutory rates set forth above, and 15% post-judgment interest for royalty owners having leases in Kansas (K.S.A. 1986 Supp. 16-204[c]) and all other jurisdictions.

The judgment of the lower court is affirmed as modified and remanded to calculate the interest due the various plaintiffs in accordance with this opinion and to enter judgment thereon.

ALLEGRUCCI, J., not participating.

IN THE SUPREME COURT
OF THE STATE OF KANSAS

No. 86-59588-AS

IRL SHUTTS, *et al.*,
Appellees,

v.

PHILLIPS PETROLEUM COMPANY,
Appellant,

ORDER

The motion for rehearing of the appellant, Phillips Petroleum Company, is considered by the Court and is denied, except for the clarification of postjudgment interest rates as follows:

On page 56 of the slip opinion, the postjudgment interest rate for Texas is modified to read:

"Tex. Rev. Civ. Stat. Ann. art. 5069-1.05 (Vernon 1987)

"The lesser of the rate specified in the implied contract (FERC rate); or 18 percent."

BY ORDER OF THE COURT this 11th day of May, 1987.

/s/ David Prager
DAVID PRAGER
Chief Justice

IN THE DISTRICT COURT
OF SEWARD COUNTY, KANSAS

Case No. 79-C-113

IRL SHUTTS and ROBERT ANDERSON and BETTY ANDERSON, individually and as representatives of all producers and royalty owners to whom Phillips Petroleum Company made payment of suspended proceeds or royalties pursuant to Federal Power Commission Opinions Nos. 699, 699H, 749, 749C, 770 and 770A,

Plaintiffs,

vs.

PHILLIPS PETROLEUM COMPANY,

Defendant.

MEMORANDUM DECISION ON REMAND

This matter comes on for determination of the remand by the United States Supreme Court to the Kansas Supreme Court and then to this Court as the original trial court. The jurisdiction of the class ordered by this Court has been affirmed, and the remaining issue is the liability of the defendant, if any, for interest on suspended royalty payments.

The facts of the case are recited in the appellate opinions and need not be repeated here.

The issue presented is whether the liability for interest decided by the Kansas Supreme Court in Shutts I and Shutts II are, as defendant alleges "unique notions of contract and oil and gas law", or is compatible with some or all of the laws of the states where the leases are located. If liability is found under the laws of any state, there is then a remaining issue of what interest rate would be applied.

Kansas: *Shutts Executor v. Phillips Petroleum Company*, 222 Kan. 527; and *Shutts v. Phillips Petroleum Company*, 235 Kan. 195.

Texas: *Phillips Petroleum Company v. Stahl Petroleum Company*, 569 SW 2d 480.

Louisiana: *Boutte v. Chevron Oil Company*, 315 F. Supp. 524.

These are the only states to have been presented this issue directly, and all have reached the same conclusion as the Kansas Supreme Court.

It may bear repeating that the issue to be decided in each state where the question arises is whether or not the defendant, as a producer, or with royalty obligations of a producer, may take advantage of the Federal Energy Regulatory Commission to withhold suspended royalties belonging to royalty owners or to buyers, and thus gain the free use of such money.

The question really presented is whether or not FERC regulations, which permit the producer to file the increased rates and collect that amount, subject to a refund of any of the amount disallowed, can be used to avoid a reasonably prompt payment of the royalty proceeds generally required of oil and gas leases in all states.

As the Texas Court noted in the *Stahl* case, quoting *Phillips Petroleum Company v. Adams*, 513 F.2d 344, "Phillips may say that its possession and utilization of funds to which it had no pretense of claim was reasonable, or even that its actions were necessary, *but Phillips cannot be heard to say that is fair and equitable that it should enjoy such a finanical advantage for so long, and pay not a cent for it.*" (Emphasis in original)

Phillips still tries to use the FERC to shield its liability herein, but FERC has no jurisdiction of royalty shares or obligations, (*Mobil Oil Corporation v. Federal Power*

Commission, 463 F.2d 256) and thus, the FERC regulations should not be available to provide a windfall for the free use of money to the defendant.

The Supreme Court of Oklahoma has provided a good indication of its position in the matter in the case of *West Edmond Hunton Line Unit v. Young*, 325 P2d 1047, in which that Court allowed royalty owners judgment for interest from the date of sale of oil sold for less than the market value. In that case, the Supreme Court of Oklahoma allowed prejudgment interest for royalty that should have been paid but was not collected.

This case would require, *a priori*, that royalties collected but unpaid to the royalty owners should accrue interest from the date of receipt by the producer. Also in that case, the defendant contended that the royalty owners had only a claim for unliquidated damages prior to judgment, and hence, under the Oklahoma law, would not be allowed prejudgment interest. The Supreme Court of Oklahoma answered this contention, finding that it was not applicable because the amount due was certain, or could be made certain by a mathematical calculation.

Thus, this Court concludes that if the issue were squarely presented to the Courts of Oklahoma, those Courts would follow the rules announced in the Shutts cases.

It is noted that Oklahoma follows the rule that interest cannot be recovered upon an unliquidated claim where trial is necessary in order to determine the amount due. This is a prevailing rule, but has no application to the mere mathematical calculation required in this case. Oklahoma has a statute (23 O.S. 1971 Sec. 22) which provides that "the detriment caused by the breach of an obligation to pay money only is deemed to be the amount due by the terms of the obligation, *with interest thereon.*" The Supreme Court of Oklahoma in *Rendezvous Trails of America, Inc. v. Ayers*, 612 P2d 1384, noted that "This

(statute) is, of course, no more than fair and merely incorporates the traditional market place function of interest to compensate another for the use of his money."

Thus, it is concluded that Oklahoma would rule the same as have the courts in Kansas, Texas and Oklahoma on the liaiblity for interest issue.

No cases have been cited (although counsel have courteously supplied copies of all cases they refer to) and none have been found bearing on the liability issue in New Mexico and Wyoming.

The State of Wyoming in 1982 adopted statutory provisions awarding interest to royalty owners within set guidelines, Wy. Stat. Ann. 30-4-301 Et Seq., but these statutes are subsequent to the cause of action in this case. No cases have been cited which would suggest that either of these states, under legal or equitable basis, or both, would refuse to award interest on the suspended royalties at issue in this case. Hence, I conclude that these states would follow the precedents of those states cited herein which have decided this issue.

No attempt has been made to address the laws of Illinois, Arkansas, Mississippi, Utah or West Virginia, since these states represent less than .15 percent of royalties here involved. Thus, there has been no affirmative showing that the law found in the Shutts case would contradict the law of any of these states. I therefore conclude that these states would also follow the logic and equitable principles announced in Shutts.

On the question of the rate of interest to be applied, Kansas has, of course, established this in the Shutts case as the applicable FERC rates.

Texas, in *Sid Richardson Carbon & Gas Co. v. Phillips Petroleum Company*, 456 F2d 203, allowed FERC rates based upon the contract price involved therein. In the *Stahl* case no issue was raised as to the rate of interest

by the pleadings or contentions of the parties, but recovery for interest was allowed upon an equitable basis. It is therefore concluded that Texas would apply the FERC rates to which the various opinions were subjected to possible refund, if the issue were properly presented.

It should be noted that under the FERC regulatory scheme, defendant was allowed to collect the increased rates, subject to its obligation to repay disapproved portions at the FERC rates applicable during this period, which closely follows money market rate.

The defendant, in the few instances in which indemnity agreements were obtained from royalty owners, and the increased rates were paid directly, required those royalty owners to agree to possible repayment at the FERC rates. The defendant thus treated the entire gas stream composed of the working interest and the royalty interest to be subjected to possible refunds at the FERC rates. It is entirely inconceivable that they should now be heard to contend that they should only be liable for statutory rates in each of the states, which were established, for the most part, prior to the 1940's, and at what best could be described as post-depression rates.

The statute in each of the states generally provides for the statutory rate, being generally six percent, but being seven percent in the State of Louisiana, in the absence of some contract, agreement, regulation, or law to the contrary. This Court finds no cases directly bearing on this matter, except the *Shutts* case in Kansas and the *Richardson* case in Texas, which are in accord. Since these cases represent the only precedents available, it is concluded that all of the states involved in this litigation would rule the FERC rates to be applicable to the interest liability imposed hereby.

Examples of interest rate statutes are as follows:

K.S.A. 16-201 (1974) "Creditors shall be allowed to receive interest at the rate of six percent per annum, when no other rate of interest is agreed upon";

O.S. Tit 15 Sec. 266 (1971) "The legal rate of interest shall be six percent in the absence of any contract as to the rate of interest";

Tex. Rev. Civ. Stat. Ann., Art. 5069-1.03 (Vernon 1971) "When no specified rate of interest is agreed upon by the parties, interest at the rate of six percent per annum shall be allowed") (all emphasis added).

These are typical of those in all states involved in this action and all allow rates other than that specified by agreement of parties, by contract or by other law. Thus, none are mandated to apply in the facts of this case.

The issues raised by the defendant, such as requiring a demand, are adequately answered in the plaintiffs' briefs herein, and which are adopted by this Court on this issue, are found to be without merit.

This Court also adopts plaintiffs' briefs by reference on the rate of interest to be imposed.

After a survey of all the cases cited by the parties hereto and applicable statutes, I find no basis to conclude that any state court would be any less logical or fair than the Kansas Supreme Court has been in the Shutts case. And I find no legal basis for concluding that these states would produce results other than those reflected in the Shutts case.

I therefore affirm the previous judgment awarded to plaintiffs against the defendant in this case.

Dated: April 30, 1986

/s/ Keaton G. Duckworth
KEATON G. DUCKWORTH
District Judge

SUPREME COURT OF THE UNITED STATES

No. 84-233

PHILLIPS PETROLEUM COMPANY,
Petitioner

v.

IRL SHUTTS, *et al.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

[June 26, 1985]

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C.J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, and O'CONNOR, JJ., joined, and in Parts I and II of which STEVENS, J., joined. STEVENS, J., filed an opinion concurring in part and dissenting in part. POWELL, J., took no part in the decision of the case.

JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner is a Delaware corporation which has its principal place of business in Oklahoma. During the 1970's it produced or purchased natural gas from leased and land located in 11 different States, and sold most of the gas in interstate commerce. Respondents are some 28,000 of the royalty owners processing rights to the

leases from which petitioner produced the gas; they reside in all 50 States, the District of Columbia, and several foreign countries. Respondents brought a class action against petitioner in the Kansas state court, seeking to recover interest on royalty payments which had been delayed by petitioner. They recovered judgment in the trial court, and the Supreme Court of Kansas affirmed the judgment over petitioner's contentions that the Due Process Clause of the Fourteenth Amendment prevented Kansas from adjudicating the claims of all the respondents, and that the Due Process Clause and the Full Faith and Credit Clause of Article IV of the Constitution prohibited the application of Kansas law to all of the transactions between petitioner and respondents. 235 Kan. 195, 679 P. 2d 1159 (1984). We granted certiorari to consider these claims. 469 U.S. 879 (1984). We reject petitioner's jurisdictional claim, but sustain its claim regarding the choice of law.

Because petitioner sold the gas to its customers in interstate commerce, it was required to secure approval for price increases from what was then the Federal Power Commission, and is now the Federal Energy Regulatory Commission. Under its regulations the Federal Power Commission permitted petitioner to propose and collect tentative higher gas prices, subject to final approval by the Commission. If the Commission eventually denied petitioner's proposed price increase or reduced the proposed increase, petitioner would have to refund to its customers the difference between the approved price and the higher price charged, plus interest at a rate set by statute. See 18 CFR § 154.102 (1984).

Although petitioner received higher gas prices pending review by the Commission, petitioner suspended any increase in royalties paid to the royalty owners because the higher price could be subject to recoupment by petitioner's customers. Petitioner agreed to pay the higher royalty only if the royalty owners would provide peti-

tioner with a bond or indemnity for the increase, plus interest, in case the price increase was not ultimately approved and a refund was due to the customers. Petitioner set the interest rate on the indemnity agreements at the same interest rate the Commission would have required petitioner to refund to its customers. A small percentage of the royalty owners provided this indemnity and received royalties immediately from the interim price increases; these royalty owners are unimportant to this case.

The remaining royalty owners received no royalty on the unapproved portion of the prices until the Federal Power Commission approval of those prices became final. Royalties on the unapproved portion of the gas price were suspended three times by petitioner, corresponding to its three proposed price increases in the mid-1970's. In three written opinions the Commission approved all of petitioner's tentative price increases, so petitioner paid to its royalty owners the suspended royalties of $3.7 million in 1976, $4.7 million in 1977, and $2.9 million in 1978. Petitioner paid no interest to the royalty owners although it had the use of the suspended royalty money for a number of years.

Respondents Irl Shutts, Robert Anderson, and Betty Anderson filed suit against petitioner in Kansas state court, seeking interest payments on their suspended royalties which petitioner had possessed pending the Commission's approval of the price increases. Shutts is a resident of Kansas and the Andersons live in Oklahoma. Shutts and the Andersons own gas leases in Oklahoma and Texas. Over petitioner's objection the Kansas trial court granted respondents' motion to certify the suit as a class action under Kansas law. Kan. Stat. Ann. § 60-223 *et seq.* (1983). The class as certified was comprised of 33,000 royalty owners who had royalties suspended by petitioner. The average claim of each royalty owner for interest on the suspended royalties was $100.

After the class was certified respondents provided each class member with notice through first-class mail. The notice described the action and informed each class member that he could appear in person or by counsel; otherwise each member would be represented by Shutts and the Andersons, the named plaintiffs. The notices also stated that class members would be included in the class and bound by the judgment unless they "opted out" of the lawsuit by executing and returning a "request for exclusion" that was included with the notice. The final class as certified contained 28,100 members; 3,400 had "opted out" of the class by returning the request for exclusion, and notice could not be delivered to another 1,500 members, who were also excluded. Less than 1,000 of the class members resided in Kansas. Only a miniscule amount, approximately one quarter of one percent, of the gas leases involved in the lawsuit were on Kansas land.

After petitioner's mandamus petition to decertify the class was denied, *Phillips Petroleum* v. *Duckworth*, No. 82-54608 (Kan. June 28, 1982), cert. denied, 459 U.S. 1103 (1983) the case was tried to the court. The court found petitioner liable under Kansas law for interest on the suspended royalties to all class members. The trial court relied heavily on an earlier, unrelated class action involving the same nominal plaintiff and the same defendant, *Shutts, Executor* v. *Phillips Petroleum Co.*, 222 Kan. 527, 567 P. 2d 1292 (1977), cert. denied, 434 U.S. 1068 (1978). The Kansas Supreme Court had held in *Shutts, Executor* that a gas company owed interest to royalty owners for royalties suspended pending final Commission approval of a price increase. No federal statutes touched on the liability for suspended royalties, and the court in *Shutts, Executor* held as a matter of Kansas equity law that the applicable interest rates for computation of interest on suspended royalties were the interest rates at which the gas company would have had to

reimburse its customers had its interim price increase been rejected by the Commission. The court in *Shutts, Executor* viewed these as the fairest interest rates because they were also the rates that petitioner required the royalty owners to meet in their indemnity agreements in order to avoid suspended royalties.

The trial court in the present case applied the rule from *Shutts, Executor*, and held petitioner liable for prejudgment and postjudgment interest on the suspended royalties, computed at the Commission rates governing petitioner's three price increases. See 18 CFR § 154.102. The applicable interest rates were: 7% for royalties retained until October 1974; 9% for royalties retained between October 1974 and September 1979; and thereafter at the average prime rate. The trial court did not determine whether any difference existed between the laws of Kansas and other States, or whether another State's laws should be applied to non-Kansas plaintiffs or to royalties from leases in states other than Kansas. 235 Kan., at 221, 679 P. 2d, at 1180.

Petitioner raised two principal claims in its appeal to the Supreme Court of Kansas. It first asserted that the Kansas trial court did not possess personal jurisdiction over absent plaintiff class members as required by *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), and similar cases. Related to this first claim was petitioner's contention that the "opt-out" notice to absent class members, which forced them to return the request for exclusion in order to avoid the suit, was insufficient to bind class members who were not residents of Kansas or who did not possess "minimum contacts" with Kansas. Second, petitioner claimed that Kansas courts could not apply Kansas law to every claim in the dispute. The trial court should have looked to the laws of each State where the leases were located to determine, on the basis of conflict of laws principles, whether in-

terest on the suspended royalties was recoverable, and at what rate.

The Supreme Court of Kansas held that the entire cause of action was maintainable under the Kansas class-action statute, and the court rejected both of petitioner's claims. 235 Kan. 195, 679 P. 2d 1159 (1984). First, it held that the absent class members were plaintiffs, not defendants, and thus the traditional minmium contacts test of *International Shoe* did not apply. The court held that nonresident class action plaintiffs were only entitled to adequate notice, an opportunity to be heard, an opportunity to opt out of the case, and adequate representation by the named plaintiffs. If these procedural due process minima were met, according to the court, Kansas could assert jurisdiction over the plaintiff class and bind each class member with a judgment on his claim. The court surveyed the course of the litigation and concluded that all of these minima had been met.

The court also rejected petitioner's contention that Kansas law could not be applied to plaintiffs and royalty arrangements having no connection with Kansas. The court stated that generally the law of the forum controlled all claims unless "compelling reasons" existed to apply a different law. The court found no compelling reasons, and noted that "[t]he plaintiff class members have indicated their desire to have this action determined under the laws of Kansas." 235 Kan., at 222, 679 P. 2d, at 1181. The court affirmed as a matter of Kansas equity law the award of interest on the suspended royalties, at the rates imposed by the trial court. The court set the postjudgment interest rate on all claims at the Kansas statutory rate of 15%. *Id.*, at 224, 679 P. 2d, at 1183.

I

As a threshold matter we must determine whether petitioner has standing to assert the claim that Kansas

did not possess proper jurisdiction over the many plaintiffs in the class who were not Kansas residents and had no connection to Kansas. Respondents claim that a party generally may assert only his own rights, and that petitioner has no standing to assert the rights of its adversary, the plaintiff class, in order to defeat the judgment in favor of the class.

Standing to sue in any Article III court is, of course, a federal question which does not depend on the party's prior standing in state court. *Doremus* v. *Board of Education*, 342 U.S. 429, 434 (1952); *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). Generally stated, federal standing requires an allegation of a present or immediate injury in fact, where the party requesting standing has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues." *Ibid.* There must be some causal connection between the asserted injury and the challenged action, and the injury must be of the type "likely to be redressed by a favorable decision." *Valley Forge Christian College* v. *Americans United for Separation of Church and State Inc.*, 454 U.S. 464, 472 (1982). See *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976); *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 261 (1977).

Additional prudential limitations on standing may exist even though the Article III requirements are met because "the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim." *Gladstones Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99-100 (1979). One of these prudential limits on standing is that a litigant must normally assert his own legal interests rather than those of third parties. See *Singleton*

v. *Wulff*, 428 U.S. 106 (1976); *Craig* v. *Boren*, 429 U.S. 190 (1976).

Respondents claim that petitioner is barred by the rule requiring that a party assert only his own rights; they point out that respondents and petitioner are adversaries and do not have allied interests such that petitioner would be a good proponent of class members' interests. They further urge that petitioner's interference is unneeded because the class members have had opportunity to complain about Kansas' assertion of jurisdiction over their claim, but none have done so. See *Singleton*, *supra*, at 113-114.

Respondents may be correct that petitioner does not possess standing *jus tertii*, but this is not the issue. Petitioner seeks to vindicate its own interests. As a class-action defendant petitioner is in a unique predicament. If Kansas does not possess jurisdiction over this plaintiff class, petitioner will be bound to 28,100 judgment holders scattered across the globe, but none of these will be bound by the Kansas decree. Petitioner could be subject to numerous later individual suits by these class members because a judgment issued without proper personal jurisdiction over an absent party is not entitled to full faith and credit elsewhere and thus has no res judicata effect as to that party. Whether it wins or loses on the merits, petitioner has a distinct and personal interest in seeing the entire plaintiff class bound by res judicata just as petitioner is bound. The only way a class action defendant like petitioner can assure itself of this binding effect of the judgment is to ascertain that the forum court has jurisdiction over every plaintiff whose claim it seeks to adjudicate, sufficient to support a defense of res judicata in a later suit for damages by class members.

While it is true that a court adjudicating a dispute may not be able to predetermine the res judicata effect of its own judgment, petitioner has alleged that it would be obviously and immediately injured if this class-action

judgment against it became final without binding the plaintiff class. We think that such an injury is sufficient to give petitioner standing on its own right to raise the jurisdiction claim in this Court.

Petitioner's posture is somewhat similar to the trust settlor defendant in *Hanson* v. *Denckla*, 357 U.S. 235 (1958), who we found to have standing to challenge the forum's personal jurisdiction over an out-of-state trust company which was an indispensable party under the forum State's law. Because the court could not proceed with the action without jurisdiction over the trust company, we observed that "any defendant affected by the court's judgment ha[d] that 'direct and substantial personal interest in the outcome' that is necessary to challenge whether that jurisdiction was in fact acquired." *Id.*, at 245, quoting *Chicago* v. *Atchison, T. & S. F. R. Co.*, 357 U.S. 77 (1958).

II

Reduced to its essentials, petitioner's argument is that unless out-of-state plaintiffs affirmatively consent, the Kansas courts may not exert jurisdiction over their claims. Petitioner claims that failure to execute and return the "request for exclusion" provided with the class notice cannot constitute consent of the out-of-state plaintiffs; thus Kansas courts may exercise jurisdiction over these plaintiffs only if the plaintiffs possess the sufficient "minimum contacts" with Kansas as that term is used in cases involving personal jurisdiction over out-of-state defendants. *E.g.*, *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945); *Shaffer* v. *Heitner*, 433 U.S. 186 (1977); *World-wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980). Since Kansas had no pre-litigation contact with many of the plaintiffs and leases involved, petitioner claims that Kansas has exceeded its jurisdictional reach and thereby violated the due process rights of the absent plaintiffs.

In *International Shoe* we were faced with an out-of-state corporation which sought to avoid the exercise of personal jurisdiction over it as a defendant by Washington state court. We held that the extent of the defendant's due process protection would depend "upon the quality and nature of the activity in relation to the fair and orderly administraton of the laws. . . ." 326 U.S., at 319. We noted that the Due Process Clause did not permit a State to make a binding judgment against a person with whom the State had no contacts, ties, or relations. *Ibid.* If the defendant possessed certain minimum contacts with the State, so that it was "reasonable and just, according to our traditional conception of fair play and substantial justice" for a State to exercise personal jurisdiction, the State could force the defendant to defend himself in the forum, upon pain of default, and could bind him to a judgment. *Id.*, at 320.

The purpose of this test, of course, is to protect a defendant from the travail of defending in a distant forum, unless the defendant's contacts with the forum make it just to force him to defend there. As we explained in *Woodson, supra*, the defendant's contacts should be such that "he should reasonably anticipate being haled" into the forum. 444 U.S., at 297. In *Insurance Corp. of Ireland* v. *Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 702-703, and n. 10 (1982) we explained that the requirement that a court have personal jurisdiction comes from the Due Process Clause's protection of the defendant's personal liberty interest, and said that the requirement "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty." (Footnote omitted).

Although the cases like *Shaffer* and *Woodson* which petitioner relies on for a minimum contacts requirement all dealt with out-of-state defendants or parties in the procedural posture of a defendant, cf. *New York Life Ins. Co.* v. *Dunlevy*, 241 U.S. 518 (1916); *Estin* v. *Estin*,

334 U.S. 541 (1948), petitioner claims that the same analysis must apply to absent class-action plaintiffs. In this regard petitioner correctly points out that a chose in action is a constitutionally recognized property interest possessed by each of the plaintiffs. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). An adverse judgment by Kansas courts in this case may extinguish the chose in action forever through res judicata. Such an adverse judgment, petitioner claims, would be every bit as onerous to an absent plaintiff as an adverse judgment on the merits would be to a defendant. Thus, the same due process protections should apply to absent plaintiffs: Kansas should not be able to exert jurisdiction over the plaintiffs' claims unless the plaintiffs have sufficient minimum contacts with Kansas.

We think petitioner's premise is in error. The burdens placed by a State upon an absent class-action plaintiff are not of the same order or magnitude as those it places upon an absent defendant. An out-of-state defendant summoned by a plaintiff is faced with the full powers of the forum State to render judgment *against* it. The defendant must generally hire counsel and travel to the forum to defend itself from the plaintiff's claim, or suffer a default judgment. The defendant may be forced to participate in extended and often costly discovery, and will be forced to respond in damages or to comply with some other form of remedy imposed by the court should it lose the suit. The defendant may also face liability for court costs and attorney's fees. These burdens are substantial, and the minimum contacts requirement of the Due Process clause prevents the forum State from unfairly imposing them upon the defendant.

A class-action plaintiff, however, is in quite different posture. The Court noted this difference in *Hansberry* v. *Lee*, 311 U.S. 32, 40-41 (1940), which explained that a "class" or "representative" suit was an exception to the rule that one could not be bound by judgment *in per-*

sonam unless one was made fully a party in the traditional sense. *Ibid., citing Pennoyer* v. *Neff*, 95 U.S. 714 (1878). As the Court pointed out in *Hansberry*, the class action was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the litigation was too great to permit joinder. The absent parties would be bound by the decree so long as the named parties adequately represented the absent class and the prosecution of the litigation was within the common interest.[1] 311 U.S., at 41.

Modern plaintiff class actions follow the same goals, permitting litigation of a suit involving common questions when there are too many plaintiffs for proper joinder. Class actions also may permit the plaintiffs to pool claims which would be uneconomical to litigate individually. For example, this lawsuit involves claims averaging about $100 per plaintiff; most of the plaintiffs would have no realistic day in court if a class action were not available.

In sharp contrast to the predicament of a defendant haled into an out-of-state forum, the plaintiffs in this suit were not haled anywhere to defend themselves upon pain of a default judgment. As commentators have noted, from the plaintiffs' point of view a class action resembles a "quasi-administrative proceeding, conducted by the judge." 3B J. Moore & J. Kennedy, Moore's Federal Practice ¶ 23.45 [4.-5] (1984); Kaplan, Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 398 (1967).

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[1] The holding in *Hansberry*, of course, was that petitioners in that case had not a sufficient common interest with the parties to a prior lawsuit such that a decree against those parties in the prior suit would bind the petitioners. But in the present case there is no question that the named plaintiffs adequately represent the class, and that all members of the class have the same interest in enforcing their claims against the defendant.

A plaintiff class in Kansas and numerous other jurisdictions cannot first be certified unless the judge, with the aid of the named plaintiffs and defendants, conducts an inquiry into the common nature of the named plaintiff's and the absent plaintiffs' claims, the adequacy of representation, the jurisdiction possessed over the class, and any other matters that will bear upon proper representation of the absent plaintiffs' interest. See, *e.g.*, Kan. Stat. Ann. § 60-223 (1983); Fed. Rule Civ. Proc. 23. Unlike a defendant in a civil suit, a class-action plaintiff is not required to fend for himself. See Kan. Stat. Ann. § 60-223(d) (1983). The court and named plaintiffs protect his interests. Indeed, the class-action defendant itself has a great interest in ensuring that the absent plaintiff's claims are properly before the forum. In this case, for example, the defendant sought to avoid class certification by alleging that the absent plaintiffs would not be adequately represented and were not amenable to jurisdiction. See *Phillips Petroleum* v. *Duckworth*, No. 82-54608 (Kan., June 28, 1982).

The concern of the typical class-action rules for the absent plaintiffs is manifested in other ways. Most jurisdictions, including Kansas, require that a class action, once certified, may not be dismissed or compromised without the approval of the court. In many jurisdictions such as Kansas the court may amend the pleadings to ensure that all sections of the class are represented adequately. Kan. Stat. Ann. § 60-223(d) (1983); see also *e.g.*, Fed. Rule Civ. Proc. 23(d).

Besides this continuing solicitude for their rights, absent plaintiff class members are not subject to other burdens imposed upon defendants. They need not hire counsel or appear. They are almost never subject to counterclaims or cross-claims, or liability for fees or costs.[2] Absent plaintiff class members are not subject to

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[2] Petitioner places emphasis on the fact that absent class members might be subject to discovery, counterclaims, cross-claims or

coercive or punitive remedies. Nor will an adverse judgment typically bind an absent plaintiff for any damages, although a valid adverse judgment may extinguish any of the plaintiff's claim which were litigated.

Unlike a defendant in a normal civil suit, an absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection. In most class actions an absent plaintiff is provided at least with an opportunity to "opt out" of the class, and if he takes advantage of that opportunity he is removed from the litigation entirely. This was true of the Kansas proceedings in this case. The Kansas procedure provided for the mailing of a notice to each class member by first-class mail. The notice, as we have previously indicated, described the action and informed the class member that he could appear in person or by counsel, in default of which he would be represented by the named plaintiffs and their attorneys. The notice further stated that class members would be included in the class and bound by the judgment unless they "opted out" by executing and returning a "request for exclusion" that was included in the notice.

Petitioner contends, however, that the "opt out" procedure provided by Kansas is not good enough, and that an "opt in" procedure is required to satisfy the Due Process Clause of the Fourteenth Amendment. Insofar as plaintiffs who have no minimum contacts with the forum State are concerned, an "opt in" provision would require that each class member affirmatively consent to his inclusion within the class.

Because States place fewer burdens upon absent class plaintiffs than they do upon absent defendants in non-

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court costs. Petitioner cites no cases involving any such imposition upon plaintiffs, however. We are convinced that such burdens are rarely imposed upon plaintiff class members, and that the disposition of these issues is best left to a case which presents them in a more concrete way.

class suits, the Due Process Clause need not and does not afford the former as much protection from state-court jurisdiction as it does the latter. The Fourteenth Amendment does protect "persons," not "defendants," however, so absent plaintiffs as well as absent defendants are entitled to some protection from the jurisdiction of a forum State which seeks to adjudicate their claims. In this case we hold that a forum State may exercise jurisdiction over the claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant. If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law,[3] it must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 399 U.S., at 314-315; cf. *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 174-175 (1974). The notice should describe the action and the plaintiffs' rights in it. Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members. *Hansberry*, 311 U.S., at 42-43, 45.

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[3] Our holding today is limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments. We intimate no view concerning other types of class actions such as those seeking equitable relief. Nor, of course, does our discussion of personal jurisdiction address class actions where the jurisdiction is asserted against a *defendant* class.

We reject petitioner's contention that the Due Process Clause of the Fourteenth Amendment requires that absent plaintiffs affirmatively "opt in" to the class, rather than be deemed members of the class if they do not "opt out." We think that such a contention is supported by little, if any precedent, and that it ignores the differences between class action plaintiffs, on the one hand, and defendants in non-class civil suits on the other. Any plaintiff may consent to jurisdiction. *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770 (1984). The essential question, then, is how stringent the requirement for a showing of consent will be.

We think that the procedure followed by Kansas, where a fully descriptive notice is sent first-class mail to each class member, with an explanation of the right to "opt out," satisfies due process. Requiring a plaintiff to affirmatively request inclusion would probably impede the prosecution of those class actions involving an aggregation of small individual claims, where a large number of claims are required to make it economical to bring suit. See, *e.g.*, *Eisen*, *supra*, at 161. The plaintiff's claim may be so small, or the plaintiff so unfamiliar with the law, that he would not file suit individually, nor would he affirmatively request inclusion in the class if such a request were required by the Constitution.[4] If, on the other hand, the plaintiff's claim is sufficiently large or important that he wishes to litigate it on his own, he will likely have retained an attorney or have thought about filing suit, and should be fully capable of exercising his right to "opt out."

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[4] In this regard the Reporter for the 1966 amendments to the Federal Rules of Civil Procedure stated:

"[R]equiring the individuals affirmatively to request inclusion in the lawsuit would result in freezing out the claims of people—especially small claims held by small people—who for one reason or another, ignorance, timidity, unfamiliarity with business or legal matters, will simply not take the affirmative step." Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 397-398 (1967).

In this case over 3,400 members of the potential class did "opt out," which belies the contention that "opt out" procedures result in guaranteed jurisdiction by inertia. Another 1,500 were excluded because the notice and "opt out" form was undeliverable. We think that such results show that the "opt out" procedure provided by Kansas is by no means *pro forma*, and that the Constitution does not require more to protect what must be the somewhat rare species of class member who is unwilling to execute an "opt out" form, but whose claim is nonetheless so important that he cannot be presumed to consent to being a member of the class by his failure to do so. Petitioner's "opt in" requirement would require the invalidation of scores of state statutes and of the class-action provision of the Federal Rules of Civil Procedure,[5] and for the reasons stated we do not think that the Constitution requires the State to sacrifice the obvious advantages in judicial efficiency resulting from the "opt out" approach for the protection of the *rara avis* portrayed by petitioner.

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[5] The following statutes or procedural rules permit "opt out" notice in some types of class actions:

Fed. Rule Civ. Proc. 23(c)(2)(A); Ala. Rule Civ. Proc. 23(c)(2)(A); Alaska Rule Civ. Proc. 23(c)(2)(A); Ariz. Rule Civ. Proc. 23(c)(2)(A); Cal. Civ. Code Ann. § 1781(e)(1) (West 1973) (consumer class action); Colo. Rule Civ. Proc. 23(c)(2)(A); Del. Ch. Ct. Rule 23(c)(2)(A); D. C. Super. Ct. Rule Civ. Proc. 23(c)(2)(A); Fla. Rule Civ. Proc. 1.220(d)(2)(A); Idaho Rule Civ. Proc. 23(c)(2)(A); Ind. Rule Trial Proc. 23(C)(2)(A); Iowa Rule Civ. Proc. 42.8(b); Kan. Stat. Ann. § 60-223(c)(2) (1983); Ky. Rule Civ. Proc. 23.03(2)(a); Me. Rule Civ. Proc. 23(c)(2)(A); Md. Rule Civ. Proc. 2-231(e)(1); Mich. Ct. Rule 3.501(C)(5)(b); Minn. Rule Civ. Proc. 23.03(2)(A); Mo. Rule Civ. Proc. 52.08; Mont. Rule Civ. Proc. 23(c)(2)(A); Nev. Rule Civ. Proc. 23(c)(2)(A); N.J. Civ. Prac. Rule 4:32-2; N.Y. Civ. Prac. Law § 904 (McKinney 1976); N.D. Rule Civ. Proc. 23(g)(2)(B); Ohio Rule Civ. Proc. 23(C)(2)(a); Okla. Stat., Tit. 12, § 2023(C)(2)(a) (Supp. 1984-1985); Ore. Rule Civ. Proc. 32F(1)(b)(ii); Pa. Rule Civ. Proc. 1711(a); Tenn. Rule Civ. Proc. 23.032)(a); Vt. Rule Civ. Proc. 23(c)(2)(A); Wash. Ct. Rule 23(C)(2)(i); Wyo. Rule Civ. Proc. 23(c)(2)(A).

We therefore hold that the protection afforded the plaintiff class members by the Kansas statute satisfies the Due Process Clause. The interests of the absent plaintiffs are sufficiently protected by the fourm State when those plaintiffs are provided with a request for exclusion that can be returned within a reasonable time to the court. See *Insurance Corp. of Ireland*, 456 U.S., at 702-703, and n. 10. Both the Kansas trial court and the Supreme Court of Kansas held that the class received adequate representation, and no party disputes that conclusion here. We conclude that the Kansas court properly asserted personal jurisdiction over the absent plaintiffs and their claims against petitioner.

III

The Kansas courts applied Kansas contract and Kansas equity law to every claim in this case, notwithstanding that over 99% of the gas leases and some 97% of the plaintiffs in the case had no apparent connection to the State of Kansas except for this lawsuit.[6] Petitioner pro-

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[6] The Commission approved petitioner's price increases in Opinion Nos. 699, 749, and 770. Petitioner reimbursed royalty owners $3.7, $2.9, and $4.7 million in suspended royalties, respectively. The States where the leases were located and their resident plaintiffs are as follows.

OPINION 699

States	*# Leases in state*	*Royalties to state leases*	*# Royalty Owners in state*
Oklahoma	1,266	$ 83,711.35	2,653
Texas	4,414	839,152.73	9,591
Kansas	3	152.88	496
Arkansas	6	3,228.22	173
Louisiana	68	2,187,548.06	1,244
New Mexico	941	433,574.85	621
Illinois	—	—	397
Wyoming	690	148,906.93	413
Mississippi	—	—	67
Utah	—	—	29

	# Leases in state	Royalties to state leases	# Royalty Owners in state
W. Virginia	——	——	20
No State Code	1	[.05]	1,025
	7,389	$3,696,274.97	

OPINION 749

States	# Leases in state	Royalties to state leases	# Royalty Owners in state
Oklahoma	1,948	$ 243,163.49	3,591
Texas	3,479	2,171,217.36	7,881
Kansas	15	2,619.24	553
Arkansas	32	1,769.33	171
Louisiana	178	352,539.45	740
New Mexico	350	22,670.27	339
Illinois	1	1.30	357
Wyoming	68	67,570.01	37
Mississippi	3	694.93	88
Utah	1	184.60	18
W. Virginia	32	10,364.61	246
No State Code	2	1,032.59	1,553
	6,109	$2,873,827.18	

OPINION 770

States	# Leases in state	Royalties to state leases	# Royalty Owners in state
Oklahoma	1,430	$ 471,122.53	2,684
Texas	3,702	2,615,744.46	8,550
Kansas	4	115.10	504
Arkansas	2	552.83	162
Louisiana	26	516,248.13	361
New Mexico	591	194,799.95	469
Illinois	1	.01	353
Wyoming	476	945,441.09	272
Mississippi	——	——	36
Utah	——	——	18
W. Virginia	——	——	[illegible]
No State Code	——	——	1,046
	6,232	$4,744,024.10	

tested that the Kansas courts should apply the laws of the States where the leases were located, or at least apply Texas and Oklahoma law because so many of the leases came from those States. The Kansas courts disregarded this contention and found petitioner liable for interest on the suspended royalties as a matter of Kansas law, and set the interest rates under Kansas equity principles.

Petitioner contends that total application of Kansas substantive law violated the constitutional limitations on choice of law mandated by the Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause of Article IV, § 1. We must first determine whether Kansas law conflicts in any material way with any other law which could apply. There can be no injury in applying Kansas law if it is not in conflict with that of any other jurisdiction connected to this suit.

Petitioner claims that Kansas law conflicts with that of a number of States connected to this litigation, especially Texas and Oklahoma. These putative conflicts range from the direct to the tangential, and may be addressed by the Supreme Court of Kansas on remand under the correct constitutional standard. For example, there is no recorded Oklahoma decision dealing with interest liability for suspended royalties: whether Oklahoma is likely to impose liability would require a survey of Oklahoma oil and gas law. Even if Oklahoma found such liability, petitioner shows that Oklahoma would most likely apply its constitutional and statutory 6% interest rate rather than the much higher Kansas rates applied in this litigation. Okla. Const. Art XIV, § 2; Okla. Stat., Tit. 15, § 266 (Supp. 1984-1985); *Rendezvous Trails of America, Inc.* v. *Ayers*, 612 P. 2d 1384, 1385 (Ok. App. 1980); *Smith* v. *Robinson*, 594 P. 2d 364 (Okla. 1979); *West Edmond Hunton Lime Unit* v. *Young*, 325 P. 2d 1047 (Okla. 1958).

Additionally, petitioner points to an Oklahoma statute which excuses liability for interest if a creditor accepts

payment of the full principal without a claim for interest, Okla. Stat. Tit. 23, § 8 (1951). Cf. *Webster Drilling Co.* v. *Sterling Oil of Oklahoma, Inc.*, 376 P. 2d 236 (Okla. 1962). Petitioner contends that by ignoring this statute the Kansas courts created liability that does not exist in Oklahoma.

Petitioner also points out several conflicts between Kansas and Texas law. Although Texas recognizes interest liability for suspended royalties, Texas has never awarded any such interest at a rate greater than 6%, which corresponds with the Texas constitutional and statutory rate.[7] Tex. Const., Art. 16, § 11; Tex. Rev. Civ. Stat. Ann., Art. 5069-1.03 (Vermont 1971). See *Phillips Petroleum Co.* v. *Stahl Petroleum Co.*, 569 S. W. 2d 480 (Tex. 1978); *Phillips Petroleum Co.* v. *Adams*, 513 F. 2d 355 (CA5), cert. denied, 423 U.S. 930 (1975); cf. *Maxey* v. *Texas Commerce Bank*, 580 S. W. 2d 340, 341 (Tex. 1979). Moreover, at least one court interpreting Texas law appears to have held that Texas excuses interest liability once the gas company offers to take an indemnity from the royalty owner and pay him the suspended royalty while the price increase is still tentative. *Phillips Petroleum Co.* v. *Riverside Gas Compression Co.*, 409 F. Supp. 486, 495-496 (N. D. Tex. 1976). Such a rule is contrary to Kansas law as applied below, but if applied to the Texas plaintiffs or leases in this case, would vastly reduce petitioner's liability.

The conflicts on the applicable interest rates, alone—which we do not think can be labeled "false conflicts" without a more thoroughgoing treatment than was accorded them by the Supreme Court of Kansas—certainly amounted to millions of dollars in liability. We think

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[7] The Kansas interest rate also conflicts with the rate which is applicable in Louisiana. At the time this suit was filed that rate was 7%. See La. Civ. Code Ann., Art. 1938 (1977) (amended in 1982); *Wurzlow* v. *Placid Oil Co.*, 279 So. 2d 749, 772-774 (La. App. 1973) (applying Art. 1938 to oil and gas royalties).

that the Supreme Court of Kansas erred in deciding on the basis that it did that the application of its laws to all claims would be constitutional.

Four Terms ago we addressed a similar situation in *Allstate Ins. Co.* v. *Hague*, 449 U.S. 302 (1981). In that case we were confronted with two conflicting rules of state insurance law. Minnesota permitted the "stacking" of separate uninsured motorist policies while Wisconsin did not. Although the decedent lived in Wisconsin, took out insurance policies and was killed there, he was employed in Minnesota and after his death his widow moved to Minnesota for reasons unrelated to the litigation, and was appointed personal representative of his estate. She filed suit in Minnesota courts, which applied the Minnesota stacking rule.

The plurality in *Allstate* noted that a particular set of facts giving rise to litigation could justify, constitutionally, the application of more than one jurisdiction's laws. The plurality recognized, however, that the Due Process Clause and the Full Faith and Credit Clause provided modest restrictions on the application of forum law. These restrictions required "that for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Id.*, at 312-313. The dissenting Justices were in substantial agreement with this principle. *Id.*, at 332 (opinion of POWELL, J., joined by BURGER, C.J., and REHNQUIST, J.). The dissent stressed that the Due Process Clause prohibited the application of law which was only casually or slightly related to the litigation, while the Full Faith and Credit Clause required the forum to respect the laws and judgments of other States, subject to the forum's own interests in furthering its public policy. *Id.*, at 335-336.

The plurality in *Allstate* affirmed the application of Minnesota law because of the forum's significant contacts

to the litigation which supported the State's interest in applying its law. *See id.*, at 313-329. Kansas' contacts to this litigation, as explained by the Kansas Supreme Court, can be gleaned from the opinion below.

Petitioner owns property and conducts substantial business in the State, so Kansas certainly has an interest in regulating petitioner's conduct in Kansas. 235 Kan., at 210, 679 P. 2d, at 1174. Moreover, oil and gas extraction is an important business to Kansas, and although only a few leases in issue are located in Kansas, hundreds of Kansas plaintiffs were affected by petitioner's suspension of royalties; thus the court held that the State has a real interest in protecting "the rights of these royalty owners both as individual residents of [Kansas] and as members of this particular class of plaintiffs." *Id.*, at 211-212, 679 P. 2d at 1174. The Kansas Supreme Court pointed out that Kansas courts are quite familiar with this type of lawsuit, and "[t]he plaintiff class members have indicated their desire to have this action determined under the laws of Kansas." *Id.*, at 211, 222, 679 P. 2d, at 1174, 1181. Finally, the Kansas court buttressed its use of Kansas law by stating that this lawsuit was analogous to a suit against a "common fund" located in Kansas. *Id.*, at 201, 211-212, 679 P. 2d, at 1168, 1174.

We do not lightly discount this description of Kansas' contacts with this litigation and its interest in applying its law. There is, however, no "common fund" located in Kansas that would require or support the application of only Kansas law to all these claims. See, *e.g.*, *Hartford Life Ins. Co.* v. *Ibs*, 237 U.S. 662 (1915). As the Kansas court noted, petitioner commingled the suspended royalties with its general corporate accounts. 235 Kan. 201, 679 P. 2d, at 1168. There is no specific identifiable res in Kansas, nor is there any limited amount which may be depleted before every plaintiff is compensated. Only by somehow aggregating all the separate claims in

this case could a "common fund" in any sense be created, and the term becomes all but meaningless when used in such an expansive sense.

We also give little credence to the idea that Kansas law should apply to all claims because the plaintiffs, by failing to opt out, evinced their desire to be bound by Kansas law. Even if one could say that the plaintiffs "consented" to the application of Kansas law by not opting out, plaintiff's desire for forum law is rarely, if ever controlling. In most cases the plaintiff shows his obvious wish for forum law by filing there. "If a plaintiff could choose the substantive rules to be applied to an action . . . the invitation to forum shopping would be irresistable." *Allstate*, 449 U.S., at 337 (opinion of POWELL, J.). Even if a plaintiff evidences his desire for forum law by moving to the forum, we have generally accorded such a move little or no significance. *John Hancock Mut. Life Ins. Co.* v. *Yates*, 299 U.S. 178, 182 (1936); *Home Ins. Co.* v. *Dick*, 281 U.S. 397, 408 (1930). In *Allstate* the plaintiff's move to the forum was only relevant because it was unrelated and prior to the litigation. 449 U.S., at 318-319. Thus the plaintiffs' desire for Kansas law, manifested by their participation in this Kansas lawsuit, bears little relevance.

The Supreme Court of Kansas in its opinion in this case expressed the view that by reason of the fact that it was adjudicating a nationwide class action, it had much greater latitude in applying its own law to the transactions in question than might otherwise be the case:

> "The general rule is that the law of the forum applies unless it is expressly shown that a different law governs, and in case of doubt, the law of the forum is preferred. . . . Where a state court determines it has jurisdiction over a nationwide class action and procedural due process guarantees of notice and ade-

> quate representation are present, we believe the law of the forum should be applied unless compelling reasons exist for applying a different law. . . . Compelling reasons do not exist to require this court to look to other state laws to determine the rights of the parties involved in this lawsuit." 235 Kan., at 221-222, 679 P. 2d, at 1181.

We think that this is something of a "bootstrap" argument. The Kansas class-action statute, like those of most other jurisdictions, requires that there be "common issues of law or fact." But while a stay may, for the reasons we have previously stated, assume jurisdiction over the claims of plaintiffs whose principal contacts are with other States, it may not use this assumption of jurisdiction as an added weight in the scale when considering the permissible constitutional limits on choice of substantive law. It may not take a transaction with little or no relationship to the forum and apply the law of the forum in order to satisfy the procedural requirement that there be a "common question of law." The issue of personal jurisdiction over plaintiffs in a class action is entirely distinct from the question of constitutional limitations on choice of law; the latter calculus is not altered by the fact that it may be more difficult or more burdensome to comply with the constitutional limitations because of the large number of transactions which the State proposes to adjudicate and which have little connection with the forum.

Kansas must have a "significant contact or significant aggregation of contacts" to the claims asserted by each member of the plaintiff class, contacts "creating state interests" in order to ensure that the choice of Kansas law is not arbitrary or unfair. *Allstate*, *supra*, at 312-313. Given Kansas' lack of "interest" in claims unrelated to that State, and the substantive conflict with jurisdictions such as Texas, we conclude that application of Kansas

law to every claim in this case is sufficiently arbitrary and unfair as to exceed constitutional limits.[8]

When considering fairness in this context, an important element is the expectation of the parties. See *Allstate, supra,* at 333 (opinion of POWELL, J.). There is no indication that when the leases involving land and royalty owners outside of Kansas were executed, the parties had any idea that Kansas law would control. Neither the Due Process Clause nor the Full Faith and Credit Clause requires Kansas "to substitute for its own [laws], applicable to persons and events within it, the conflicting statute of another state," *Pacific Employees Insurance Co.* v. *Industrial Accident Commn,* 306 U.S. 493, 502 (1939), but Kansas "may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them." *Home Insurance Co.* v. *Dick, Supra,* at 410.

Here the Supreme Court of Kansas took the view that in a nationwide class action where procedural due process guarantees of notice and adequate representation were met, "the laws of the forum should be applied unless

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[8] In this case the Kansas Supreme Court held that "[t]he trial court did not determine whether any difference existed between the laws of Kansas and other states or whether another state's law should be applied." 235 Kan. 195, 221, 679 P.2d 1159, 1180 (1984). Respondents contend that the trial court and the supreme court actually incorporated by reference the opinion *Shutts, Executor* 222 Kan. 527, 567 P.2d 1292 (1977), where the court looked to the Texas and Oklahoma interest rate statutes and found them inapplicable. We do not think that the Kansas Supreme Court fully adopted the choice of law discussion in *Shutts, Executor* as its holding in this case. But even if we agreed that *Shutts, Executor* was somehow incorporated below, that would be insufficient. *Shutts, Executor* was a pre-*Allstate* case involving only two other states, rather than the 10 present here. Moreover, the gas region involved in *Shutts, Executor* was primarily within Kansas borders. *Shutts, Executor* only considered the conflict involving interest rate liability and state statutes, and in finding the 6% Texas rate inapplicable it cited but did not follow contrary Texas precedent. 222 Kan., at 562-565, 567 P.2d, at 1317-1319.

compelling reasons exist for applying a different law." 235 Kan. at 221, 679 P. 2d at 1181. Whatever practical reasons may have commended this rule to the Supreme Court of Kansas, for the reasons already stated we do not believe that it is consistent with the decisions of this Court. We make no effort to determine for ourselves which law must apply to the various transactions involved in this lawsuit, and we reaffirm our observation in *Allstate* that in many situations a state court may be free to apply one of several choices of law. But the constitutional limitations laid down in cases such as *Allstate and Home Insurance Co.* v. *Dick*, *supra*, must be respected even in a nationwide class action.

We therefore affirm the judgment of the Supreme Court of Kansas insofar as it upheld the jurisdiction of the Kansas courts over the plaintiff class members in this case, and reverse its judgment insofar as it held that Kansas law was applicable to all of the transactions which it sought to adjudicate. We remand the case to that Court for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE POWELL took no part in the decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 84-233

PHILLIPS PETROLEUM COMPANY,
Petitioner
v.
IRL SHUTTS, *et al.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

[June 26, 1985]

JUSTICE STEVENS, concurring in part and dissenting in part.

For the reasons stated in Parts I and II of the Court's opinion, I agree that the Kansas courts properly exercised jurisdiction over this class action. I also recognize that the use of the word "compelling" in a portion of the Kansas Supreme Court's opinion, when read out of context, may create an inaccurate impression of that court's choice of law holding. See *ante*, at 23. Our job, however, is to review judgments, not to edit opinions, and I am firmly convinced that there is no constitutional defect in the judgment under review.

As the Court recognizes, there "can be no [constitutional] injury in applying Kansas law if it is not in

conflict with that of any other jurisdiction connected to this suit." *Ante*, at 19. A fair reading of the Kansas Supreme Court's opinion in light of its earlier opinion in *Shutts* v. *Phillips Petroleum Co.*, 222 Kan. 527, 567 P. 2d 1292 (1977), cert. denied, 434 U.S. 1068 (1978) (hereinafter *Shutts I*), reveals that the Kansas court has examined the laws of connected jurisdictions and has correctly concluded that there is no "direct" or "substantive" conflict between the law applied by Kansas and the laws of those other States. Cf. *ante*, at 19, 24. Kansas has merely developed general common law principles to accommodate the novel facts of this litigation—other State courts either agree with Kansas or have not yet addressed precisely similar claims. Consequently, I conclude that the Full Faith and Credit Clause of the Constitution [1] did not require Kansas to apply the law of any other State, and the Fourteenth Amendment's Due Process Clause [2] did not prevent Kansas from applying its own law in this case.

The Court errs today because it applies a loose definition of the sort of "conflict" of laws required to state a *constitutional* claim, allowing Phillips a tactical victory here merely on allegations of "putative" or "likely" conflicts. *Ante*, at 19. The Court's choice-of-law analysis also treats the two relevant constitutional provisions as though they imposed the same constraints on the forum court. In my view, however, the potential impact of the Kansas choice on the interests of other sovereign States and the fairness of its decision to the litigants should be separately considered. See *Allstate Insurance Co.* v. *Hague*, 449 U.S. 302, 320 (1981) (STEVENS, J., concur-

[1] "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. Const., Art. IV, § 1. See also 28 U.S.C. § 1738.

[2] "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const., Amdt. 14, § 1.

ring in judgment). For both inquiries, it is essential to have a better understanding of the merits of the underlying dispute than can be gleaned from the Court's opinion. I therefore begin with an explanation of the background of this litigation.

I

Petitioner (Phillips) is a large independent producer, purchaser, and seller of natural gas. Beginning in 1954, the prices at which it sold natural gas to interstate pipeline companies were regulated by the Federal Power Commission (Commission).[3] *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954). As a party to a large number of producing oil and gas leases, Phillips is obligated to pay a percentage of the value of the production, usually one-eighth, to persons owning an interest in the leased areas, so-called "royalty owners." Some royalty owners are due monthly royalties by contractual agreements made directly with Phillips. See *Shutts I*, *supra*, at 532, 567 P. 2d, at 1298. Others are due royalties under contracts made with other gas producers who then sell their gas to Phillips—by separate contract with those producers, Phillips has "assumed the producer's responsibility to distribute the royalties . . . to the royalty owners." 235 Kan. 195, 218, 679 P. 2d 1159, 1178 (1984). The relationship between Phillips and the royalty owners is not regulated by the Commission although it is, of course, materially affected by the Commission's control over the pricing relationship between Phillips and its customers.

In a series of orders entered after 1954, the Commission established a practice of suspending price increases proposed by Phillips until approved by the Commission, but allowing Phillips to collect the higher proposed prices

[3] The responsibilities of the Federal Power Commission were transferred to the Federal Energy Regulatory Commission in 1977. See 91 Stat., 578, 582-584.

upon the filing by Phillips with the Commission of a corporate undertaking to refund to its customers any portion of an increase that is ultimately disapproved by the Commission. Pursuant to Commission regulation, Phillips agrees that unapproved prices it collects are subject to refund "with interest at seven percent (7%) per annum from the date of receipt until September 18, 1970, and eight percent (8%) per annum thereafter until paid out, if the FPC [does] not approve the sales price." *Shutts I, supra*, at 533, 567 P. 2d, at 1299 (emphasis deleted) (citing 18 CFR § 154.102(c) (1977) and Commission opinion No. 586, 44 F. P. C. 761, 791 (1970)). Phillips' receipts during periods when its proposed price increases have not yet received final approval therefore include two components—the "firm" proceeds and the "FPC suspense money." For example, while an increase in price from 11 cents per Mcf (thousand cubic feet) to 13 cents is under consideration, the collection of the higher price would include firm proceeds of 11 cents and 2 cents of FPC suspense money.

In July 1961, while a price increase applicable to the tri-state Hugoton-Anadarko area (Kansas, Oklahoma, and Texas) was pending, Phillips sent a notice to the royalty owners for that area advising them that "until further notice" they would be paid royalties on the basis of firm proceeds only and that royalties based on suspense money would be paid only after it was "determined that the sums collected are no longer subject to refund." The notice also advised the royalty owners that they could receive ongoing payment of royalties on the suspense money as well if they furnished Phillips with an "acceptable indemnity to cover their proportionate part of any required refunds, *plus the required interest.*" 222 Kan., at 534, 567 P. 2d, at 1299 (emphasis added).[4]

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[4] The revelant portion of the 1961 notice provided in full:

"Effective June 1, 1961, and until further notice, royalties paid you will be computed by excluding that portion of any price being

The indemnity which Phillips required was a corporate security bond covering a principal amount based on estimated production for a two-year period, plus the 7% interest rate Phillips would be required to pay to its customers if the price increase were not approved. Only 17 royalty owners provided Phillips with such an indemnity; approximately 6,400 royalty owners who did not do so did not receive royalties on the suspense proceeds until 11 years later, after the price increase was finally approved. The situation was succinctly summarized by the Kansas Supreme Court in *Shutts I*:

> "From June 1, 1961, to October 1, 1970, Phillips deposited the increased rate monies collected *in its general account and commingled it with its other funds*, without ever giving notice of this fact to royalty owners during the time it was holding money. It is important to note that during this period of time *Phillips had no entitlement to the gas royalty owners' share of the 'suspense royalties,' whether or not the rates were approved by the FPC.* Phillips never owned this money. While Phillips collected eight-eighths (8/8) of the increased rates,

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collected subject to refund which exceeds 11 [cents] per Mcf (presently the maximum area price level for increased rates as recently announced by the Federal Power Commission in its Statement of General Policy). Payment of royalty based on the balance of the sums collected will be made at such time as it is determined that the sums collected are no longer subject to refund.

"Interest owners desiring to receive payments computed currently on the full sums being collected may arrange to do so by furnishing Phillips Petroleum Company acceptable indemnity to cover their proportionate part of any required refunds, plus the required interest." *Shutts I*, 222 Kan., at 534, 567 P.2d, at 1299.

The practice of withholding suspense royalties pending final Commission price approval was sustained in *Ashland Oil & Refining Co.* v. *Staats, Inc.*, 271 F. Supp. 571, 579 (Kan. 1967), and *Boutte* v. *Chevron Oil Co.*, 316 F. Supp. 524 (ED La. 1970), aff'd, 442 F.2d 1337 (CA5 1971) (*per curiam*).

> under no condition was the one-eighth (1/8) of the increase attributable to the royalty owners ever to go to Phillips. That royalty share, according to eventual FPC ruling, was either to go to Phillips' royalty owners, or back to Phillips' gas purchasers with interest, or part to one and part to the other." *Id.*, at 535, 567 P. 2d, at 1300 (emphasis in original).

In 1970, the Commission entered an order approving Phillips' Hugoton-Anadarko price increases to the extent of approximately $153,000,000 and disapproving them to the extent of approximately $29,000,000. Thus, over 18 percent of the suspense money had to be refunded to Phillips' customers, with interest at the rates to which Phillips had agreed under Commission regulation. Having no jurisdiction over the relationship between Phillips and the royalty owners, however, the Commission's order was silent on the subject of royalties on the $153,000,000 of suspense money that did not have to be refunded. After the Commission's order was finally affirmed by the Ninth Circuit in 1972, *In re Hugoton-Anadarko Area Rate Case*, 466 F. 2d 974, Phillips mailed checks to the royalty owners for their share of the suspense monies based on the approved higher prices that had been collected since 1961. However, "Phillips neither paid nor offered to pay any interest for the use of the money, nor did Phillips say anything about interest or how long the money had been held or used by Phillips." *Shutts I*, *supra*, at 537, 567 P. 2d, at 1301.

The foregoing facts gave rise to *Shutts I*. This case (*Shutts II*) involves suspense royalties due on similar price increases approved in 1976, 1977, and 1978 to a larger number of royalty owners (28,100) with interests in leased areas located in 11 States, including Kansas. Otherwise, however, "[w]ith a few exceptions this case is similar in legal issues and factual situation to that presented in *Shutts* [*I*]." 235 Kan., at 198, 679 P. 2d,

at 1165. Both cases involve what the Kansas Supreme Court has characterized as a "common fund" consisting of the suspense royalties undeniably owned by Phillips but not paid for periods of several years while Commission approval of rate increases were pending.[5] It is undisputed that Phillips enjoyed the unfettered use of that money. See 222 Kan., at 560, 567 P. 2d, at 1316 (testimony of Phillips' Treasurer). It is also undisputed that when the Commission proceedings ended, none of the money could be retained by Phillips. To the extent that a price increase was disapproved, a refund to the purchasing pipelines, plus interest at the rate set by the Commission, would be required; to the extent that the increases were approved, the money was contractually owed to the royalty owners. As the Kansas court noted: "What is significant is these gas royalty suspense monies

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[5] "Had Phillips put the 'suspense royalties' into a common trust fund, separate from its operating funds, to be used solely to pay either the pipeline companies or the gas royalty owners once the FPC ultimately decided the rate increase question, this case would dovetail nicely into the 'common fund' cases." *Shutts I*, 222 Kan., at 552, 567 P.2d, at 1311. Accord, 235 Kan., at 201, 212, 679 P.2d, at 1168, 1174. The Court criticizes Kansas' use of the "common fund" concept as applied to these funds. *Ante*, at 22. Kansas is not alone, however, in applying the common fund concept in a class action to a pool of readily identifiable monies placed within the court's power by a liability determined by the lawsuit itself. See, *e.g.*, *Perlman* v. *First National Bank of Chicago*, 15 Ill. App. 3d 784, 799-802, 305 N.E. 2d 236, 247-250 (1973) (cited in *Shutts I*, 222 Kan., at 553, 567 P.2d, at 1311-1312); see also *Sprague* v. *Ticonic National Bank*, 307 U.S. 161, 166-167 (1939) (common fund may be "recovered" in litigation); Dawson, Lawyers and Involuntary Clients: Attoreys Fees From Funds, 87 Harv. L. Rev. 1597, 1615 (1974) ("Funds can also be created by the litigation itself"). Moreover, it is of course no concern of this Court how Kansas chooses to develop its state common law doctrines. Absent some constitutional foundation plainly lacking here, the Court's criticism of Kansas' substantive state law is entirely gratuitous.

never did nor could belong to Phillips." *Id.*, at 560, 567 P. 2d, at 1316 (emphasis deleted).[6]

In *Shutts I*, the Kansas Supreme Court held that general equitable principles required the award of interest on royalties owed to royalty owners but used by Phillips for a number of years. In support of that conclusion it relied on general statements in two Kansas cases[7] and a long line of federal cases applying *Texas* law and concluding that equity requires "the award of interest on suspense royalties under similar circumstances." *Id.*, at 561, 567 P. 2d, at 1317.[8] The court noted that Oklahoma

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[6] Phillips argued below that some distinction should be made for purposes of interest liability between royalties owed on gas sold to pipeline companies who paid the higher "suspense" price and royalties owed on gas used by Phillips itself rather than sold. Yet "Phillips acknowledges . . . that its obligation to pay royalties under the various . . . contracts *exists without regard to the actual disposition of the gas.*" 235 Kan., at 215, 679 P.2d, at 1177 (emphasis added). Thus, "[b]y choosing to withhold payment Phillips was allowed the use of the suspense monies during the suspense period which rightfully belonged to the royalty owners, and the royalty owners, in turn, were deprived of receiving and using those monies during that time." *Id.*, at 216, 679 P.2d at 1177. Applying the same unjust enrichment theory developed in *Shutts I*, the Kansas Supreme Court accordingly rejected Phillips' proffered distinction. *Id.*, at 217, 679 P.2d at 1178. Significantly, Phillips does not claim here that even a "putative" conflict of laws might turn on this distinction. Phillips pursues the argument only to contend in a footnote that, because it never actually collected higher prices on gas that it used itself, no "fund" actually existed. Brief for Petitioner 21, n. 18. As the Kansas court noted, however, the fund at issue is the "easily computed" amount of *royalties* that were due the royalty owners in any case, not the monies collected by Phillips in return for sales. 235 Kan., at 217, 679 P.2d, at 1178.

[7] *Lightcap* v. *Mobil Oil Corp.*, 221 Kan. 448, 562 P.2d 1, cert. denied, 434 U.S. 876 (1977); *Shapiro* v. *Kansas Public Employees Retirement System*, 216 Kan. 353, 357, 532 P.2d 1081, 1084 (1975).

[8] The Court cited six cases, four from the Fifth Circuit and two from the Northern District of Texas, in all of which Phillips was a named party.

had no decisions allowing interest on suspense royalties, but concluded that "several Oklahoma decisions hold that interest may be awarded on equitable grounds where necessary to arrive at a fair compensation. (*Smith* v. *Owens*, 397 P. 2d 673 [Okla. 1963]; and *First Nat. Bank & T. Co.* v. *Exchange Nat. Bank and T. Co.*, 517 P. 2d 805 [Okla. App. 1973])."[9] Finally, the court construed the royalty agreements at issue as containing a "contractual obligation" to pay interest on the royalties "for the period of time the suspense money was held and used by Phillips." *Id.*, at 562, 567 P. 2d, at 1317. Thus the Kansas court also found its result consistent with the only Texas state court decision on point, *Stahl Petroleum Co.* v. *Phillips Petroleum Co.*, 550 S. W. 2d 360 (Tex. Civ. App. 1977), which had "awarded interest on suspended royalties" based on "the terms of the royalty agreement . . . rather than unjust enrichment." 222 Kan. at 561, 567 P. 2d, at 1317. Significantly, when the Texas Supreme Court subsequently affirmed the *Stahl* judgment, it relied on the Kansas Supreme Court's decision in *Shutts I* to decide that equity as well as contract law requires interest on suspense royalties. *Phillips Petroleum Co.* v. *Stahl Petroleum Co.*, 569 S. W. 2d 480, 485-488, and n. 5 (1978).

After determining that Phillips was liable for interest on the suspense royalties, the court reversed the trial court's decision that the rate should be 6 percent because that was the statutory interest rate in Kansas, Oklahoma, and Texas. The Kansas Supreme Court noted that the statutory rate in all three States expressly applied only when no other rate had been agreed upon,[10]

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[9] The Kansas court also pointed out that "the United States Supreme Court has noted the imposition of interest on refunds ordered by the FPC is not an inappropriate means of preventing unjust enrichment. (*United Gas* v. *Callery Properties*, 382 U.S. 223)." 222 Kan., at 562, 567 P.2d, at 1317-1318.

[10] See Kan. Stat. Ann. § 16-201 (1974) ("Creditors shall be allowed to receive interest at the rate of six percent per annum,

and that in this case Phillips had made an express agreement, evidenced by its corporate undertaking, to pay interest at the rate set by the Commission on suspense monies found refundable. 222 Kan., at 564, 567 P. 2d, at 1319. The Kansas court therefore declined to apply *any* State's interest statute, including its own. "[E]quitable principles require, and contractual principles dictate, that the royalty owners receive the same treatment" as refunded purchasers, that is, payment at the same FPC rate of interest.[11] *Id.*, at 563, 567 P. 2d, at 1318.

Finally, the Kansas Supreme Court rejected Phillips' contention that royalty owners had "waived" their claims to interest by accepting payment of the royalties later or by failing to post an indemnity "acceptable" to Phillips in order to receive contemporaneous payment of suspense royalties. The court noted that the "conditions imposed by Phillips were far more stringent than the corporate undertaking Phillips filed with the FCC," *id.* at 567, 567 P. 2d, at 1320, and concluded that it was "apparent [that] Phillips' previous imposition of burden-

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when no other rate of interest is agreed upon"); Okla. Stat., Tit. 15, § 266 (1971) ("The legal rate of interest shall be six per cent *in the absence of any contract* as to the rate of interest"); Tex. Rev. Civ Stat. Ann., Art. 5069-1.03 (Vernon 1971) ("*When no specified rate of interest is agreed upon by the parties*, interest at the rate of 6% per annum shall be allowed") (all emphasis added).

[11] The court also held that interest accruing after the entry of judgment should be determined by Kansas' post-judgment interest statute. Kan. Stat. Ann. § 16-204 (1974). Phillips does not and could not contend that the Constitution bars a Kansas court from applying the Kansas post-judgment interest statute to judgments entered by Kansas courts. Such statutes demonstrate an irrefutable state interest in the force carried by judgments entered by a State's own courts. See also *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487, 498 (1941) (State interest statutes concern "an incidental item of damages, interest, with respect to which courts at the forum have commonly been free to apply their own or some other law as they see fit").

some conditions upon royalty owners . . . was designed to accomplish precisely what the facts disclose. Virtually none of the royalty owners complied with the conditions, thereby leaving the suspense royalties in the hands of Phillips as stakeholder to use at its pleasure . . . ." *Id.*, at 566, 567 P. 2d, at 1320. The Court found the rule that "payment of the principal sum is a legal bar to a subsequent action for interest" inapplicable on these facts. *Id.*, at 567, 567 P. 2d, at 1321. Instead, because "payment of [the royalties due] to the plaintiff class members, instead of extinguishing the debt, constituted only a partial payment on an interest-bearing debt[,] [t]his situation invokes application of the so-called 'United States Rule,' which provides that in applying partial payments to an interest-bearing debt which is due, in the absence of an agreement or statute to the contrary, the payment should be first applied to the interest due." *Ibid.*[12]

In *Shutts II*, the case now under review, the Kansas Supreme Court adopted its earlier analysis in *Shutts I* without repeating it. "Although a larger class is involved than in *Shutts I*, the legal issues presented are substantially the same. While these issues are complex they were thoroughly reviewed in *Shutts I*." 235 Kan., at 211, 679 P. 2d, at 1174.[13] Noting that "Phillips has not satis-

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[12] The Court noted that the " 'United States Rule' is also followed in Oklahoma and Texas," and that Phillips had "raised and lost" its contention of waiver in a similar case in Texas. 222 Kan., at 568, 567 P.2d, at 1321, citing *Phillips Petroleum Co.* v. *Riverview Gas Compression Co.*, 409 F. Supp. 486 (ND Tex. 1976). Moreover, because the relevant Oklahoma statute expressly stated that payment of a principal sum must be accepted "as such" to support a finding of waiver, Okla. Stat. Tit. 23, § 8 (1971), the statute was inapplicable here inasmuch as the royalty payments were not so accepted. 222 Kan., at 568, 567 P.2d, at 1321.

[13] The only apparently new argument raised by Phillips in *Shutts II* was that it should not be liable for interest to a subclass of the affected royalty owners whose direct contractual agreement for

factorily established why this court should not apply the rule enunciated in *Shutts I*," the Kansas court went on to state that once jurisdiction over a "nationwide class action" is properly asserted, "the law of the forum should be applied unless compelling reasons exist for applying a different law." *Id.*, at 221, 679 P. 2d, at 1181.

II

This Court, of course, can have no concern with the substantive merits of common-law decisions reached by state courts faithfully applying their own law or the law of another state. When application of purely state law is at issue, "[t]he power delegated to us is for the restraint of unconstitutional [actions] by the States, and not for the correction of alleged errors committed by their judiciary." *Commercial Bank of Cincinnati* v. *Buckingham's Executors*, 5 How. 317, 343 (1847). The Constitution does not expressly mandate particular or correct choices of law. Rather, a State court's choice of law can invoke constitutional protections, and hence our jurisdiction, only if it contravenes some explicit constitutional limitation.[14]

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royalties was with other producers who sold their gas to Phillips under a separate agreement. Although Phillips assumed the obligation to pay royalties directly to the royalty owners in these separate agreements, the separate agreements also stated that if a suspended price increase were ultimately approved by the Commission, Phillips would pay the *other producers* additional money "without interest." Phillips argued that this "without interest" clause barred interest to the royalty owners as well as to the other producers. The Kansas Supreme Court rejected this argument, however, because the royalty owners were not parties to the separate agreements and because no consideration was paid to the royalty owners by Phillips in return for this purported waiver of interest. 235 Kan., at 220, 679 P.2d, at 1180. "[T]hese provisions, entered into between Phillips and the producers, can not unilaterally deprive royalty owners of interest which they would otherwise be entitled to receive under casinghead gas contracts in which the provisions do not appear." *Ibid.*

[14] See 28 U.S.C. § 1257: "Final judgments or decres rendered by the highest court of a State . . . may be reviewed by the Supreme

Thus it has long been settled that "a mere misconstruction by the forum of the laws of a sister State is not a violation of the Full Faith and Credit Clause." *Carroll* v. *Lanza*, 349 U.S. 408, 414, n. 1 (1955) (Frankfurter, J., dissenting).[15] That clause requires only that States accord "full faith and credit" to other States' laws—that is, acknowledge the validity and finality of such laws and attempt in good faith to apply them when necessary as they would be applied by home state courts.[16] But as Justice Holmes explained, when there is "nothing to suggest that [one State's court] was not candidly construing [another State's law] to the best of its ability, . . . even if it was wrong something more than an error of construction is necessary" to invoke the Constitution. *Pennsylvania Fire Ins. Co.* v. *Gold Issue Mining & Milling Co.*, 243 U.S. 93, 96 (1917).

Merely to state these general principles is to refute any argument that Kansas' decision below violated the Full Faith and Credit Clause. As the opinion in *Shutts I* indicates, the Kansas court made a careful survey of the relevant laws of Oklahoma and Texas, the only other states whose law is proffered as relevant to this litigation. But, as the Court acknowledges, *ante*, at 19-20, no other

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Court . . . (3) [b]y writ of certiorari . . . where any title, right, privilege or immunity is specially set up or claimed *under the Constitution*" (emphasis added).

[15] This principle was settled in a number of cases decided on either side of the turn of this century. See, *e.g.*, *Pennsylvania Fire Ins. Co.* v. *Gold Issue Mining & Milling Co.*, 243 U.S. 93, 96 (1917); *Western Life Indemnity Co.* v. *Rupp*, 235 U.S. 261, 275 (1914); *Louisville & Nashville R. Co.* v. *Melton*, 218 U.S. 36, 51, 52 (1910); *Allen* v. *Alleghany Co.*, 196 U.S. 458, 464-465 (1905); *Johnson* v. *New York Life Ins. Co.*, 187 U.S. 491, 496 (1903); *Glenn* v. *Garth*, 147 U.S. 360, 367-370 (1893).

[16] Cf. *Guaranty Trust Co.* v. *New York*, 326 U.S. 99, 109 (1945) (federal courts should apply state law in furtherance of the goal that "the outcome of the litigation in the federal court should be substantially the same . . . as it would be if tried in a State court").

State's laws or judicial decisions were precisely on point, and, in the Kansas court's judgment, roughly analogous Texas and Oklahoma cases supported the results the Kansas court reached. The Kansas court expressly declared that, in a multistate action, a "court should also give careful consideration, as we have attempted to do, to any possible conflict of law problems." 222 Kan., at 557, 567 P. 2d, at 1314.[17] While a common law judge might disagree with the substantive legal determinations made by the Kansas court (although nothing in its opinion seems erroneous to me), that court's approach to the possible choices of law evinces precisely the "full faith and credit" that the Constitution requires.

It is imaginable that even a good faith review of another State's law might still "unjustifiably infring[e] upon the legitimate interests of another State" so as to violate the Full Faith and Credit Clause. *Allstate*, 449 U.S., at 323 (STEVENS, J., concurring in judgment). If, for example, a Texas oil company or a Texas royalty owner with an interest in a Texas lease were treated directly contrary to a stated policy of the State of Texas by a Kansas court through some honest blunder, the Constitution might bar such "parochial entrenchment" on Texas' interests. *Thomas* v. *Washington Gas Light Co.*, 448 U.S. 261, 272 (1980) (plurality opinion).[18] But this

[17] The Kansas court also stated that Kansas' statutory class action requirements would "not be fulfilled" if "liability is to be determined according to varying and inconsistent state laws." 222 Kan., at 557, 567 P.2d, at 1314. This belies any notion that the Kansas court plans to "bootstrap," *ante*, at 23, its choice of law decisions onto its assertion of jurisdiction over multistate actions; precisely the opposite is suggested.

[18] As I noted in *Allstate*, however, the litigant challenging a court's choice of law clearly "bears the burden of establishing" a constitutional infringement. 449 U.S., at 325, n. 13. "*Prima facie* every state is entitled to enforce in its own courts its own statutes . . . . One who challenges that right . . . assumes the burden of showing, upon some rational basis, that of the conflicting interests

case is so distant from such a situation that I need not pursue this theoretical possibility. Even Phillips does not contend that any stated policies of other States have been plainly contravened, and the Court's discussion is founded merely on an *absence* of reported decisions and the Court's speculation of what Oklahoma or Texas courts might "most likely" do in a case like this. *Ante*, at 19. There is simply no demonstration here that the Kansas Supreme Court's decision has impaired the legitimate interests of any other States or infringed on their sovereignty in the slightest.

III

It is neverthless possible for a State's choice of law to violate the Constitution because it is so "totally arbitrary or . . . fundamentally unfair" to a litigant that it violates the Due Process Clause. *Allstate*, 449 U.S., at 326 (STEVENS, J., concurring in judgment). If the forum court has no connection to the lawsuit other than its jurisdiction over the parties, a decision to apply the forum State's law might so "frustrat[e] the justifiable expectations of the parties" as to be unconstitutional. *Id.*, at 327.[19]

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involved those of the foreign state are superior to those of the forum." *Alaska Packers Assn.* v. *Industrial Accident Comm'n*, 294 U.S. 532, 547 (1935). See *Western Life Indemnity Co.* v. *Rupp*, 235 U.S., at 275 ("It does not appear that the court's attention was called to any decision by the courts of Illinois placing a different construction, or indeed any construction, upon the section in question. If such decision existed, it was incumbent upon defendant to prove it"). Thus, if a litigant has failed to call a state court's attention to relevant law in other jurisdictions, it cannot raise that law here to create a constitutional issue.

[19] I noted in *Allstate* that choice of forum law might also violate the Due Process Clause in other ways, such as by irrationally favoring residents over nonresidents or representing a "dramatic departure from the rule that obtains in most American jurisdictions." 449 U.S., at 327. The first possibility is not applicable here; all royalty owners were treated exactly alike in the Kansas

Again, however, a constitutional claim of "unfair surprise" cannot be based merely upon an unexpected choice of a particular State's law—it must rest on a persuasive showing of an unexpected *result* arrived at by application of that law. Thus, absent any *conflict* of laws, in terms of the results they produce, the Due Process Clause simply has not been violated. This is because the underlying theory of a choice-of-law due process claim must be that parties plan their conduct and contractual relations based upon their legitimate expectations concerning the subsequent legal consequences of their actions. For example, they might base a decision on the belief that the law of a particular State will govern. But a change in that State's law in the interim between the execution and the performance of the contract would not violate the Due Process Clause. Nor would the Constitution be violated simply because a state court made an unanticipated ruling on a previously unanswered question of law—perhaps a choice-of-law question.

In this case it is perfectly clear that there has been no due process violation because this is a classic "false conflicts" case.[20] Phillips has not demonstrated that any sig-

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court's analysis. As for the second possibility, a "dramatic departure" must be distinguished from the application of general equitable principles to address new situations. Phillips may criticize Kansas' allegedly "unique notions of contract and oil and gas law," Brief for Petitioner 33, but such is not a *constitutional* objection. State courts, like this Court, constantly must apply and develop general legal principles to accomodate novel factual circumstances with the overarching goal of achieving a just result. Today's decision, for example, newly establishes lawful jurisdiction over a multistate plaintiffs' class action that Phillips likely could not have anticipated 15 years ago. Absent some demonstration of a *departure* from some clear *rule* obtaining in other States, an argument merely that "[n]o other state ever has hinted" at Kansas' result, *id.*, at 32, is unavailing.

[20] " '[F]alse conflict' really means 'no conflict of laws.' If the laws of both states relevant to the set of facts are the same, or would produce the same decision in the lawsuit, there is no real

nificant conflicts exist merely because Oklahoma and Texas state case law is *silent* concerning the equitable theories developed by the Kansas courts in this litigation, or even because the language of some Oklahoma and Texas statutes suggests that those States would "most likely" reach different results. *Ante*, at 19-20. The Court's heavy reliance on the characterization of the law provided by Phillips is not an adequate substitute for a neutral review. *Ante*, at 19 ("Petitioner claims," "petitioner shows," "petitioner points to," "Petitioner also points out . . .") As is unmistakable from a review of *Shutts I*, the Kansas Supreme Court has examined the same laws cited by the Court today as indicative of "direct" conflicts, and construed them as supportive of the Kansas result.[21] Our precedents, to say nothing of

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conflict between them." R. Leflar, American Conflicts Law § 93, p. 188 (3d ed. 1977). See also E. Scoles & P. Hay, Conflict of Laws § 2.6, p. 17 (1982) ("A 'false conflict' exists when the potentially applicable laws do not differ"). The absence of any direct conflicts here distinguishes this case from decisions such as *Home Ins. Co.* v. *Dick*, 281 U.S. 397 (1930) and *John Hancock Mutual Life Ins. Co.* v. *Yates*, 299 U.S. 178 (1936), where the interstate legal conflicts were clear, conceded, and dispositive.

[21] In *Shutts II* the Kansas Supreme Court noted that "the legal issues presented are substantially the same" as in *Shutts I*, and that "[w]hile these issues are complex they were thoroughly reviewed in *Shutts I*." 235 Kans., at 211, 679 P.2d, at 1174. The Court then addressed the award and rate of interest as "damages to compensate the plaintiffs for the unjust enrichment derived by Phillips from the use of the plaintiffs' money," and concluded that "[i]n the instant case Phillips has not satisfactorily established why this court should not apply the rule enunciated in *Shutts I*" respecting this claim. *Id.*, at 221, 679 P. 2d, at 1181. Two sentences later in the same paragraph, the Court made the broad statement that its forum law should apply absent "compelling reason." The only fair reading of this statement in context is that the Kansas court in *Shutts II* adopted its multistate choice-of-law survey performed in *Shutts I*, and properly placed the burden on Phillips, see n.18, *supra*, to show why the *Shutts I* conclusions should be reexamined. Even if this were ambiguous, this Court should give the Kansas Supreme Court the benefit of the doubt when reviewing its judgment. Thus,

the Constitution and our statutory jurisdiction review state-court judgments, do not permit the Court to second-guess these substantive judgments. Moreover, an independent examination demonstrates solid support for the Kansas court's conclusions.[22]

I frankly do not understand the Court's summary rejection of that court's attempt to incorporate *Shutts I*. *Ante*, at 24, n. 7. As for the implication in that same footnote that the choice-of-law discussion in *Shutts I* may have been erroneous on the merits, the statement that the Kansas court "did not follow *contrary* Texas precedent" (emphasis added), is simply wrong. See n. 22, *infra*.

[22] The Court provides a list of "putative conflicts" *ante*, at 19-20. The errors and omissions apparent in the Court's discussion demonstrate the dangers of relying on characterizations of state law provided by an interested party.

1. Although there technically may be "no recorded Oklahoma decision dealing with interest liability *for suspended royalties*," *ante*, at 19 (emphasis added), Oklahoma law expressly provides that the damages "caused by the breach of an obligation to pay money only is deemed to be the amount due by the terms of the obligation, *with interest thereon*." Okla. Stat. Tit. 23, § 22 (emphasis added); see also § 6 ("Any person who is entitled to recover damages certain, or capable of being made certain by calculation, . . . is entitled also to recover interest thereon"). The Oklahoma Supreme Court has specifically held that oil field royalty owners may sue as a class to recover royalties due them and may recover interest on the amount of recovery. *West Edmond Hunton Line Unit* v. *Young*, 325 P. 2d 1047 (Okla. 1958).

2. No authority in the Court's string citation regarding Oklahoma's 6% statutory interest rate supports the statement that Oklahoma would "most likely" impose that rate in a suit such as this. *Ante*, at 19. The constitutional and statutory provisions merely provide that "in the absence of any contract" the rate is indeed 6%. Okla. Stat. Ann., Tit. 15, § 266 (1981). The cited judicial decisions merely hold that interest is recoverable on certain obligations, including royalties due to oil field royalty owners, without discussing applicable limitations on the rate.

After examining these Oklahoma authorities, the Kansas Supreme Court found the Oklahoma statutory rate, as well as that of Texas and Kansas, inapplicable by its own terms, because here Phillips had contractually agreed to the higher federal rate. 235 Kan., at

The crux of my disagreement with the Court is over the standard applied to evaluate the sufficiency of allegations of choice-of-law conflicts necessary to support a con-

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220-221, 679 P. 2d, at 1180; 222 Kan., at 563-565, 567 P. 2d, at 1318-1319. No reported Oklahoma decision contradicts this judgment and the express terms of the Oklahoma statute permit it. See also *McAnally* v. *Ideal Federal Credit Union*, 428 P. 2d 322, 326 (Okla. 1967) (where federal law provides for interest in excess of 12% per year, that rate "must govern" over Oklahoma statutory rate).

3. The Kansas court similarly reviewed Texas' 6% interest statute and found that Phillips' contractual agreement to the FPC rate rendered the statute inapplicable. 235 Kan., at 220, 679 P. 2d, at 1180; 222 Kan., at 563-565, 567 P. 2d, at 1318-1319. It is true that Texas has not awarded suspense royalty interest at a rate higher than 6%—it is equally plain from the cited cases that no higher rate has been sought. Texas courts have, however, specifically permitted recovery at higher rates when a contract, even an implied or oral contract, evidences agreement to such rates. *Preston Farm & Ranch Supply, Inc.* v. *Bio-Zyme Enterprises*, 625 S. W. 2d 295 (Tex. 1981); *Moody* v. *Main Bank of Houston*, 667 S. W. 2d 613 (Tex. App. 1984).

4. While noting Phillips' reliance on an Oklahoma statute stating that "accepting payment of the whole principal, as such, waives all claim to interest," Okla. Stat. Ann., Tit. 23, § 8 (1981), the Court itself demonstrates that this statute's application here is open to question, by citing as "cf." *Webster Drilling Co.* v. *Sterling Oil of Okla., Inc.*, 376 P. 2d 236, 238 (Okla. 1962). In that case, the Oklahoma Supreme Court held that when a right to interest is "based upon a contract, the interest has become 'a substantive part of the debt itself,'" and Title 23, § 8, "is not applicable." *Id.*, at 238 (citation omitted). The claim to interest upheld in *Webster Drilling* was based on an implied contract, exactly as the Kansas Supreme Court found in *Shutts I*. 222 Kan., at 562, 565, 567 P. 2d, at 1317, 1319. The Kansas Supreme Court explicitly considered Title 23, § 8, and relied on *Webster Drilling* to find it inapplicable. 222 Kan., at 568, 567 P. 2d, at 1321. It is therefore impossible to suggest, as the Court does, that the Kansas court "ignor[ed]" the Oklahoma statute. *Ante*, at 19.

5. Finally, the Court plainly misconstrues Texas law by suggesting that a mere "offer" to pay suspended royalties in return for an indemnity agreement would, by itself, excuse interest. In the fed-

stitutional claim. Rather than potential, "putative," or even "likely" conflicts, I would require demonstration of an *unambiguous* conflict with the *established* law of another State as an essential element of a constitutional choice-of-law claim. Arguments that a State court has merely applied general common law principles in a novel manner, or reconciled arguably conflicting laws erroneously in the face of unprecedented factual circumstances should not suffice to make out a constitutional issue.

In this case, the Kansas Supreme Court's application of general principles of equity, its interpretation of the agreements, its reliance on the Commission's regulations,[23] and its construction of general statutory terms

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eral decision cited by the Court, which mentions no Texas cases at the relevant pages, *Phillips Petroleum Co.* v. *Riverside Gas Co.*, 409 F. Supp., at 495-496, indemnity agreements were *actually entered into. Id.* at 490. The Fifth Circuit case relied on for authority, which *did* cite Texas cases, states that an "*unconditional* offer to give up possession of a disputed fund" is necessary before a bar to interest is created. *Phillips Petroleum Co.* v. *Adams*, 513 F. 2d 355, 370 (1975) (emphasis added). The Texas Supreme Court has subsequently agreed that *Adams* correctly stated Texas law. *Phillips Petroleum Co.* v. *Stahl Petroleum Co.*, 569 S. W. 2d 480, 487 (1978). See also *Fuller* v. *Phillips Petroleum Co.*, 408 F. Supp. 643, 646 (ND Tex. 1976) (entering indemnity agreement terminates interest liability because Phillips "lost the reasonably free use of the money"). No indemnity agreements were entered into by the plaintiffs here, however, and as the Kansas Supreme Court found, Phillips' indemnity offer was not "unconditional"—to the contrary, it was "far more stringent that the corporate undertaking Phillips filed with the FPC." 222 Kan., at 567, 567 F. 2d, at 1320. It is also uncontested that Phillips continued to use freely the unpaid suspense royalties long after its "burdensome" conditions were not accepted by the royalty owners. *Id.*, at 566, 567 P. 2d, at 1320. The Court errs drastically by relying on what one Federal District Court "appears" to have held to sustain a *constitutional* choice-of-law claim.

[23] The fact that the Kansas court rejected its own State's statute in favor of the uniform federal interest rate, to which it found Phillips had contractually agreed, demonstrates the absence of

contravened no established legal principles of other States and consequently cannot be characterized as either arbitrary or fundamentally unfair to Phillips. I therefore can find no due process violation in the Kansas court's decision.[24]

IV

In final analysis, the Court today may merely be expressing its disagreement with the Kansas Supreme Court's statement that in a "nationwide class action . . . the law of the forum should be applied unless compelling reasons exist for applying a different law." 235 Kan., at 221, 679 P. 2d, at 1181. Considering this statement

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parochialism from its decision. There is absolutely no indication that Texas or Oklahoma courts would have decided differently had the same claim been presented there.

[24] Neither Phillips nor the Court contends that Kansas cannot constitutionally apply its own laws to the claims of Kansas residents, even though the leased land may lie in other states and no other apparent connection to Kansas may exist. Phillips has done business in Kansas throughout the years relevant to this litigation and it seems unarguable that application of Kansas law, or indeed the law of any of the 50 states where royalty owners reside, to the claims of at least some of the plaintiff class members was thus "perceived as possible" by Phillips "at the time of contracting." *Allstate*, 449 U. S., at 331, n. 24 (STEVENS, J., concurring in judgment); see *id.*, at 316-318, and n. 22. It was also possible, of course, that any number of royalty owners might have moved to Kansas in the years Phillips held their suspense royalties, and that Kansas has a substantial interest in seeing its residents treated fairly when they invoke the jurisdiction of its courts. See Weinberg, Conflicts Cases and the Problem of Relevant time, 10 Hofstra L. Rev. 1023, 1040-1043 (1982). Because Phillips must have anticipated application of Kansas law to some claims, the eventual geographic distribution of royalty owners' residences goes only to "likelihood" and not to fairness of the application of Kansas law. *Allstate, supra*, at 331, n. 24 (STEVENS, J., concurring in judgment). Additionally, it is easy enough for national firms like Phillips to make clear their expectations by placing express choice-of-law clauses in their contracts. See *Allstate, supra*, at 318, n. 24; *id.*, at 324, 328 (STEVENS, J., concurring in judgment); *Clay* v. *Sun Ins. Office, Ltd.*, 377 U. S. 179, 182 (1964). No such clauses are present here, however.

against the background of the Kansas Supreme Court's careful analysis in *Shutts I*, however, I am confident that court would agree that every State court has an obligation under the Full Faith and Credit Clause to "respect the legitimate interests of other States and avoid infringement upon their sovereignty." *Allstate*, 449 U.S., at 322 (STEVENS, J., concurring in judgment); see *Nevada* v. *Hall*, 440 U.S. 410, 421, 424, n. 24 (1979).

It is also agreed that "the fact that a choice-of-law decision may be unsound . . . does not necessarily implicate the federal concerns embodied in the Full Faith and Credit Clause." *Allstate*, 449 U.S., at 323 (STEVENS, J., concurring in judgment); see *ante*, at 25 ("in many situations a state court may be free to apply one of several choices of law"); *Allstate*, 449 U.S., at 307 (plurality opinion). When a suit involves claims connected to States other than the forum State, the Constitution requires only that the relevant laws of other States that are brought to the attention of the forum court be examined fairly prior to making a choice of law.[25] Because this Court "reviews judgments, not opinions," *Chevron U. S. A., Inc.* v. *National Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984), criticism of a portion of the Kansas court's opinion taken out of context provides an insufficient basis for reversing its judgment. Unless the actual *choice* of Kansas law violated substantial constitutional rights of the parties, see 28 U.S.C. § 2111, our power to review judgments of state law—including the state law of choice of law—does not extend to reversal

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[25] See *Allstate*, *supra*, at 326 (STEVENS, J., concurring in judgment) (footnote omitted): "I question whether a judge's decision to apply the law of his own State could ever be described as wholly irrational. For judges are presumably familiar with their own state law and may find it difficult and time consuming to discover and apply correctly the law of another State. The forum State's interest in fair and efficient administration of justice is therefore sufficient, in my judgment, to attach a presumption of validity to a forum State's decision to apply its own law to a dispute over which it has jurisdiction."

based on disagreement with the law's application. A review of the record and the underlying litigation here convincingly demonstrates that, despite Phillips' protestations regarding Kansas' development of common-law principles, no disregard for the laws of other States nor unfair application of Kansas law to the litigants has occurred.[26] Phillips has no constitutional right to avoid judgment in Kansas because it might have convinced a court in another State to develop its law differently.

I do not believe the Court should engage in detailed evaluations of various States' laws. To the contrary, I believe our limited jurisdiction to review state-court judgments should foreclose such review.[27] Accordingly, I trust that today's decision is no more than a momentary aberration, and that the Court's opinion will not be read as a decision to constitutionalize novel state court develop-

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[26] Accord, 3 H. Newberg, Newberg on Class Actions § 13.28, p. 63 (2d ed. 1985) ("the Kansas court in *Shutts II* may have committed only harmless error in applying its own law because there appears to be no significant conflict of laws among the states involved").

[27] The Court's decision in *Allstate* has been criticized on the ground that there may well have been no true conflict of laws present, and, therefore, no need for extended constitutional discussion. See Weintraub, Who's Afraid of Constitutional Limitations on Choice of Law?, 10 Hofstra L. Rev. 17, 18-24 (1981). As I have demonstrated, the Court is once again open to this criticism.

Indeed, unless our review is restricted to cases in which conflicts are unambiguous, the Court will constantly run the risk of misconstruing the common law of any number of States. For example, the Kansas Supreme Court has already decided that Oklahoma would not apply its statutory interest rates where there is evidence of a contractual agreement to a different rate, and that such an agreement is present here. 235 Kan., at 220, 679, P. 2d, at 1180; 222 Kan., at 562-565, 567 P. 2d, at 1318-1319. Yet today the Court speculates that Oklahoma "would most likely apply" its statutory rates in this lawsuit. *Ante*, at 19. Since this Court has no more authority to resolve such issues of Oklahoma law than does the Kansas Supreme Court, however, the latter court remains free to abide by its former judgment.

ments in the common law whenever a litigant can claim that another State connected to the litigation "most likely" would reach a different result. The Court long ago decided that state-court choices of law are unreviewable here absent demonstration of an unambiguous conflict in the established laws of connected States. See n. 15, *supra*. "To hold otherwise would render it possible to bring to this court every case wherein the defeated party claimed that the statute of another State had been construed to his detriment." *Johnson* v. *New York Life Ins. Co.*, 187 U. S. 491, 496 (1903). Having ignored this admonition today, the Court may be forced to renew its turn-of-the-century efforts to convince the bar that state-court judgments based on fair evaluations of other States' laws are final.

Accordingly, while I join Parts I and II of the Court's opinion, I respectfully dissent from Part III and from the judgment.

IN THE SUPREME COURT
OF THE STATE OF KANSAS

No. 55,796

IRL SHUTTS and ROBERT ANDERSON and BETTY ANDERSON, Individually and as representatives of all producers and royalty owners to whom Phillips Petroleum Company made payment of suspended proceeds of royalties pursuant to Federal Power Commission Opinion Nos. 669, 669H, 749, 749C, 770 and 770A, *Appellees, v.* PHILLIPS PETROLEUM COMPANY,

Appellant.

SYLLABUS BY THE COURT

1. CLASS ACTION—*Jurisdiction over Nonresident Plaintiff Class Members.* While the essential element to establish in personam jurisdiction over nonresident defendants is some "minimum contacts" between the defendant and the forum state, the element necessary to the exercise of jurisdiction over nonresident plaintiff class members is procedural due process.

2. SAME—*Jurisdiction over Nonresident Plaintiff Class Members—Due Process—Binding Judgment.* Where the procedural due process guarantees of notice and adequate representation are present, Kansas courts may exercise jurisdiction over nonresident plaintiffs in a class action under K.S.A. 60-223 and issue a judgment binding on the nonresident plaintiff class members.

3. SAME—*Representation of Class—Due Process.* The class action is premised on the theory that members of the class who are not before the court can justly be bound because the self-interest of their representative coincides with the interest of the members of the

class and will assure adequate litigation of the common issues. Where the interests of absent class members have not been adequately represented, binding them by the class judgment would seem to offend the requirements of due process. Notice to absent members of the class in this regard is particularly important, for it is the greatest single safeguard against inadequate representation.

4. SAME—*Representation of Class—Adequacy.* What constitutes adequate representation is a question of fact to be determined by the trial court based upon the circumstances of each case. The decision should not be disturbed on appeal absent a showing of an abuse of discretion.

5. SAME—*Representative of Class—Adequacy—Considerations.* In determining the adequacy of the representative the trial court should consider: (1) whether there is adequate competent counsel; (2) whether the litigants are involved in a collusive suit; (3) whether the interests of the named parties are conflicting with or are antagonistic in any way to the interests of the other members of the class; (4) whether the named representatives' interests are coextensive with the interests of the other members of the class; and (5) the extent of the named representatives' interests in the suit's outcome.

6. SAME—*Certification of Class Action—Trial Judge Considerations.* Before a class action is certified the trial judge should consider concepts of manageability in terms of our Kansas class action statute, the nature of the controversy and the relief sought, the interest of Kansas in having the matter determined, and the class size and complexity.

7. SAME—*Prerequisites to Class Action—Commonality Requirement.* The commonality requirement of K.S.A. 60-223(*a*) (2) requires the existence of either

a common question of fact or a common question of law. It does not require the presence of both.

8. SAME—*Jurisdiction over Nonresident Plaintiff Class Members—Due Process Notice Requirements.* In a review of the record on appeal involving a plaintiff class action which includes nonresident plaintiffs, it is *held*: Reasonable notice and adequate representation were afforded the absent nonresident plaintiff class members which satisfies jurisdictional and constitutional due process requirements.

9. EQUITY—*Party Making Use of Another's Money Should Pay Interest on Money So Used.* Where a party retains and makes actual use of money belonging to another, equitable principles require that it pay interest on the money so retained and used.

10. OIL AND GAS—*Interest on Royalties Held in Suspense.* In an action by royalty owners against their producer or purchaser of gas for interest on royalties held in "suspense," pending determination of lawful rates by the Federal Power Commission, it is held that interest on suspended royalties may be recovered for the period of time such royalties remained in the control of, and were available for use by, the gas producer or purchaser during the pendency of FPC proceedings and related litigation regarding the determination of applicable lawful rates for gas sales, and litigation regarding the determination of issues involved in this appeal.

11. SAME—*Contract between Gas Producer and Royalty Owners for Month-to-Month Payments—Obligation of Producer to Pay Interest on Suspended Royalties.* Where the lessee gas producer has expressly contracted to make month-to-month payments to the royalty owners based upon the price received for the sale of any gas in the designated area, the obligation to pay interest on the suspended royalties owed the

royalty owners exists whether during the period in which the royalties where suspended the gas was purchased by a pipeline company and the increased price was actually received, or the gas was consumed by the producer.

12. SAME—*Interest on Royalties Held in Suspense—Royalty Owners Not Parties to Contracts between Buyers and Producers Are Entitled to Interest on Suspense Royalties.* Where casinghead gas contracts entered into between producers (lessees) and the buyer of gas provide that the buyer pay royalties on behalf of the producers and further provide that suspense royalties held pending FPC determination of lawful rates be paid to royalty owners, after the rate increase is authorized, "without interest," the royalty owners who are not parties to the contracts are entitled to interest on the suspense royalties which they otherwise are entitled to under the leasing agreement.

13. CLASS ACTION—*Jurisdiction of State in Multistate Class Action—Application of Law of Forum State.* Where a state court determines it has jurisdiction over a multistate class action and procedural due process guarantees of notice and adequate representation are present, the law of the forum should be applied unless compelling reasons exist for applying a different law.

14. SAME—*Attorney Fees—Considerations.* In determining the amount of attorney fees to be awarded in a class action the trial court must hold an evidentiary hearing so that it has before it sufficient information to make a fair and adequate fee award. Factors which should be considered by the trial court in determining the size of attorney fees in a class action include: (1) the number of hours spent on the case by the various attorneys and the manner in which they were spent; (2) the reasonable hourly

rate for each attorney; (3) the contingent nature of success; (4) the extent, if any, to which the quality of an attorney's work mandates increasing or decreasing the amount to which the court has found the attorney reasonably entitled; (5) the amount involved in the class action; and (6) the benefit produced by the lawsuit.

15. SAME—*Attorney Fees—Appellate Review.* Where established guidelines are followed by the district court in determining the size of the attorney fee to be awarded in a class action, appellate review is limited to abuse of discretion.

Appeal from Seward district court; KEATON G. DUCKWORTH, judge. Opinion filed March 24, 1984. Affirmed as modified.

Joseph W. Kennedy, of Morris, Laing, Evans, Brock & Kennedy, Chartered of Wichita, argued the cause, and *Robert W. Coykendall*, of the same firm, *James R. Yoxall*, of Light, Yoxall, Antrim & Richardson, of Liberal, and *T. L. Cubbage, II*, of Phillips Petroleum Company, of Bartlesville, Oklahoma, were with him on the briefs for the appellant.

W. Luke Chapin, of Chapin, Penny & Goering, of Medicine Lodge, argued the cause, and *Ed Moore*, of Ginder & Moore, of Cherokee, Oklahoma, and *Harold K. Greenleaf*, of Smith, Greenleaf & Brooks, of Liberal, were with him on the brief for the appellees.

Gerald Sawatzky and *Jim H. Goering*, of Foulston, Siefkin, Powers & Eberhardt, of Wichita, were on the brief for the *amicus curiae*, Sun Oil Company.

The opinion of the court was delivered by

SCHROEDER, C.J.: This is a class action suit brought against Phillips Petroleum Company (Phillips) by Irl

Shutts, Robert Anderson and Betty Anderson, individually and on behalf of 28,100 royalty owners, including those who are not residents of Kansas, for recovery of interest on "suspense royalties" on gas produced from leases in eleven states. These royalties were withheld by Phillips at various times from July 1974 to February 1978 under three Federal Power Commission (FPC) opinions pertaining to gas rates in nationwide gas rate proceedings, and later paid by Phillips to the royalty owners without interest. The trial court determined (1) the class consisted of all royalty owners and overriding royalty owners who received suspense royalties from Phillips, whether or not they were residents of Kansas, (2) Phillips was liable for interest on all royalties and overriding royalties retained by it under the FPC opinions, and (3) the applicable rate of interest owed on the suspended royalty payments. Phillips challenges these findings on appeal. The plaintiff class has cross-appealed contending the trial court incorrectly determined the applicable rate of interest.

With a few exceptions this case is similar in legal issues and factual situation to that presented in *Shutts, Executor v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292 (1977), *cert. denied* 434 U.S. 1068 (1978) (hereinafter referred to as "*Shutts I*"). The following relevant facts were stipulated to by the parties in the pretrial order and later adopted by the trial court as part of its findings of fact in its journal entry of judgment. This action was filed in July 1979, by Irl Shutts, a resident of Kansas, and Robert Anderson and Betty Anderson, residents of Oklahoma. Shutts is the owner of royalty interests under five leases owned by Phillips in Texas and Oklahoma. The Andersons are owners of gas royalty interests under a lease owned by Phillips in Oklahoma.

Notice was given to 33,000 potential class members by first-class mail. Approximately 3,400 class members

elected to opt out of the class and notice could not be delivered to approximately 1,500 other potential class members, thereby reducing the size of the class to approximately 28,100 members. No notice by publication was used in this case.

Beginning with FPC Opinion No. 699 the Federal Power Commission began rate making on a nationwide, rather than areawide, basis as had been done previously. Payments of gas royalties were suspended in part by Phillips under FPC Opinion No. 699 from July 1974 through July 1976; under FPC Opinion No. 749 from January 1976 through February 1978; and under FPC Opinion No. 770 from August 1976 through July 1977. Notices of the suspended payments were sent to royalty owners on various dates during the suspension periods. Following final approval of price increases, royalties were paid to the royalty owners in the approximate amounts of $3,700,000 under Opinion No. 699; $2,900,000 under Opinion No. 749; and $4,700,000 under Opinion No. 770.

Increased prices for gas sales were collected by Phillips during the suspension periods subject to a duty to refund to the purchasers in the event the ordered price increases were not approved. Through all or part of the periods of suspension Phillips withheld the royalty payments attributable to the price increases in Opinion Nos. 699, 749 and 770, unless the royalty owners put up an acceptable indemnity to repay the increased portion of the royalty *with interest* if the price increases were not approved.

On termination of the suspension periods Phillips resumed payments of royalties based on the increased prices to all of its royalty and overriding royalty owners to whom it accounted. Phillips also paid the royalty and overriding royalty owners the increased royalties due them which had been suspended under the three FPC opinions. *Phillips neither paid nor offered to pay inter-*

est on the royalties which had been suspended under the FPC orders.

The following chart indicates the number of leases located in Kansas and number of Kansas royalty owners, in relation to the total number of leases and royalty owners, affected by the three FPC opinions:

OPINION NUMBER:	699	749	770
Number Leases Affected	7,389	6,109	6,232
Number Leases in Kansas	3	15	4
Royalties Paid on Kansas Leases	$ 152.88	$ 2,619.24	$ 115.10
Total Royalties Paid	$3,696,274.97	$2,873,827.18	$4,744,024.10
Total Number Royalty Owners Affected	22,328	20,566	19,298
Number of Kansas Royalty Owners	496	533	504
Royalties Paid to Kansas Royalty Owners	$ 9,281.75	$ 37,818.00	$ 75,538.68

The largest number of leases affected under all three opinions are located in Texas and Oklahoma. Royalty owners who were paid suspense royalties under the FPC opinions are domiciled in the 50 states, the District of

Columbia, the Virgin Islands, and several foreign countries. Further facts will be developed as necessary to discuss the issues raised on appeal.

Phillips first contends the trial court erred in certifying a nationwide class because (1) the court's exercise of jurisdiction over nonresident plaintiffs is not in accord with recent decisions of the United States Supreme Court and is prohibited by the due process clause, and (2) sufficient affiliating circumstances do not exist between the plaintiff class and forum to satisfy the requirement set forth in *Shutts I* that the forum have a legitimate interest in adjudicating the common claims of the plaintiff class. Following a hearing on the motion to certify the class the trial court determined, in pertinent part:

> "2. The claims of plaintiff are typical of the claims of all the members of the class except that each owner may be entitled to a different amount of interest and the interest to each owner, if allowed, would be too small to enable each to file a separate action.
>
> "3. The only questions of law and fact in this case are common to the entire proposed class, in that the sole issue appears to be whether defendant is liable for interest on the money received by it from purchasers of gas pursuant to opinions No. 699, 749 and 770 of the Federal Power Commission and withheld by defendant for a period from December 30, 1975, to July 1, 1980.
>
> "4. This action should be certified as a class action and the plaintiff class is defined as follows:
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> > 'All royalty owners and overriding royalty owners to whom Phillips Petroleum Company made suspense royalty payments between December 30, 1975, and July 1, 1980, relating to Federal Power Commissions Opinions 699, 749

> and 770 (which includes 699H, 749C and 770A).'
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> "5. Notice of the pendency of this action, its nature and effects of any judgment shall be given to all members of the class. . . . The defendant shall provide to the plaintiffs a list of all members of the class and their mailing address as shown by defendant's records."

A petition for writ of mandamus to direct the district judge to decertify the class as to all unnamed nonresident plaintiff class members was denied by this court in *Phillips Petroleum Co. v. Duckworth*, Case No. 54,608, June 28, 1982. A petition for *certiorari* from the denial of mandamus was denied by the United States Supreme Court, —— U.S. ——, 74 L.Ed.2d 951, 103 S.Ct. 725 (1983).

In *Shutts I* this court extensively discussed the issue of whether a Kansas court may assert jurisdiction in a plaintiff class action over nonresident plaintiff class members who have no "minimum contacts" with the State. The class action filed in *Shutts I* sought to recover interest on suspense royalties attributable to gas produced from leases in the three-state Hugoton-Anadarko area. The plaintiff, a Kansas resident, was the representative of a class of 6,400 gas royalty owners, only 218 of which were residents of Kansas. While the record did not reflect the number in the plaintiff class residing in other states which held gas leases covering land in Kansas, the largest physical portion of the Hugoton-Anadarko area was situated in Kansas. 222 Kans. at 537.

In *Shutts I* the court rejected Phillips' contention that the trial court did not have jurisdiction over in personam claims of unnamed nonresident class plaintiffs having no contact with Kansas. In so doing the court first examined the "minimum contacts" requirement established in

Internat. Shoe Co. v. Washington, 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 (1945), and its progeny, for exercising in personam jurisdiction by a state over a nonresident *defendant*. The court held the "minimum contacts" test is inapplicable to nonresident *plaintiffs* in a class action, reasoning:

> "Whether all *nonresident plaintiffs* in a class action are required to have 'minimum contacts' with the forum is a different matter. Because a class action must necessarily proceed in the absence of almost every class member, we hold the residential makeup of the class membership is not controlling. (Note, Consumer Class Actions with a Multistate Class: A Problem of Jurisdiction, [25 Hastings L. J. 1411] 1432 [1974].) What is important is that the nonresident plaintiffs *be given notice and an opportunity to be heard and that their rights be justly protected by adequate representation.* These are the essential requirements of due process, and they must be satisfied in any class action by every court, state or federal, regardless of the residence of the absent class members. Therefore, while the essential element necessary to establish jurisdiction over nonresident defendants is some 'minimum contacts' between the defendant and the forum state, *the element necessary to the exercise of jurisdiction over nonresident plaintiff class members is procedural due process.*" (Emphasis in original.) 222 Kan. at 542-43.

The court discussed the restrictions on access to the federal courts in class action suits, 222 Kan. at 544-45, and cited numerous cases and other authorities which support the view that a state court has the power to bind a non-resident plaintiff class member. 222 Kan. at 543, 547-49. In addition, the court found the case to be "closely analogous" to cases recognizing a class action may be binding on nonresident plaintiffs when a "common fund" is involved and where due process require-

ments are met. 222 Kan. at 552. In *Shutts I*, as here, Phillips commingled the suspense royalties with its other funds which it used to fulfill all its business obligations, rather than maintaining a separate fund.

Phillips first contends the holding in *Shutts I*, that a state court can exercise jurisdiction over unnamed nonresident class plaintiffs where procedural due process is satisfied, is not in accord with two recent decisions of the United States Supreme Court and should therefore be overruled. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-92, 62 L.Ed.2d 490, 100 S.Ct. 559 (1980); *Rush v. Savchuk*, 444 U.S. 320, 327, 62 L.Ed.2d 516, 100 S.Ct. 571 (1980). *Woodson* involved the exercise of in personam jurisdiction by a state court over a nonresident *defendant* in a products liability action whereas *Rush* involved the exercise of *quasi in rem* jurisdiction over a nonresident *defendant* in a tort action. Both cases merely reiterate the due process considerations and minimum contacts test set forth in *Internat. Shoe Co. v. Washington*, 326 U.S. at 316, and subsequent cases.

As was the case in *Shutts I*, these cases deal with nonresident *defendants*, not nonresident *plaintiffs*. These cases rely entirely upon discussions of due process contained in *Internat. Shoe*; *Hanson v. Denckla*, 357 U.S. 235, 2 L.Ed.2d 1283, 78 S.Ct. 1228 (1958); and *Shaffer v. Heitner*, 433 U.S. 186, 53 L.Ed.2d 683, 97 S.Ct. 2569 (1977), all of which were fully reviewed in *Shutts I*. 222 Kan. at 541-42. No new concepts of due process are presented in *Woodson* or *Rush* which were not considered in *Shutts I* and which would warrant a reversal or modification of the opinion in that case.

The decision of this court in *Shutts* I has been widely cited by other courts in recognizing that where procedural due process guarantees of notice and adequate representation are present state courts are empowered to entertain multistate plaintiff class actions and to is-

sue judgments binding on nonresident class members. See *Miner v. Gillette Co.*, 87 Ill. 2d 7, 12-13, 428 N.E.2d 478 (1981); *In re No. Dist. of Cal. "Dalkon Shield" IUD Products*, 526 F. Supp. 887, 906, n. 79 (N.D. Calif. 1981), *vacated and remanded* 693 F.2d 847 (1982); *Schlosser v. Allis-Chalmers Corp.*, 86 Wis. 2d 226, 241-42, 271 N.W.2d 879 (1978); *Katz v. NVF Co.*, 119 Misc. 2d 48, 51, 462 N.Y.S. 2d 975 (1983). See also *Geller v. Tabas*, 462 A.2d 1078, 1083 (Del. 1983). Most authorities are in apparent agreement that due to the representative character of plaintiff and defendant class actions, procedural due process standards govern the power of state courts to bind absent class members. See Restatement (Second) of Judgments § 41 (1982); 3B Moore's Federal Practice ¶ 23.11[5], p. 23-2893 (1983); Newberg on Class Actions § 1206 *et seq.* (1980 Supp.). In Newberg on Class Actions § 1206a, the author comments:

> "Under settled principles of due process, state courts have personal jurisdiction over defendants residing within the territorial limits of the state, and also over nonresident defendants but only when the defendant has some minimal connection to the forum. Multistate class actions, however, fall in a different category from those to which these traditional notions of personal jurisdictional limits of state courts over defendants apply. Tests of territorial jurisdictional limits or minimum contacts with the forum are inapplicable and need not be satisfied in order for a state court to issue a judgment, *e.g.* in a plaintiff's class action, which is binding on nonresident members of the class."

Phillips argues the decision in *Shutts I* "ignores the balance between the courts of coequal sovereign states inherent in the federal constitution and recognized by the United States Supreme Court." The appellant refers to the language in *Woodson*, 444 U.S. at 292, that the

concept of minimum contacts "acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." One commentator agrees that the issue of jurisdiction asserted by state courts in multistate plaintiff class actions must be viewed in the context of our federal system. See Note, Multistate Plaintiff Class Actions: Jurisdiction and Certification, 92 Har. L. Rev. 718, 729, 733 (1979). However, as we noted in *Shutts I*, recent United States Supreme Court cases restricting access to the federal courts in class action suits have made it necessary for state courts to hear nationwide class actions:

> "Recently the United States Supreme Court has required plaintiffs to assume the cost of notice in common-question class actions. (*Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 40 L.Ed.2d 732, 94 S.Ct. 2140.) The United States Supreme Court has also refused to aggregate class action claims to meet the $10,000 federal jurisdictional requirements. (*Zahn v. International Paper Co.*, 414 U.S. 291, 38 L.Ed. 2d 511, 94 S.Ct. 505; and *Snyder v. Harris*, 394 U.S. 332, 22 L.Ed.2d 319, 89 S.Ct. 1053, reh. denied 394 U.S. 1025, 23 L.Ed.2d 50, 89 S.Ct. 1622.) While the results are supported by the fear of overloading the federal judicial system and the desire not to judicially expand the constitutionally established jurisdictional limits, these recent United States Supreme Court cases have clearly restricted access to federal courts. This suit, for example, could not be brought in a federal court. Furthermore, the FPC does not have jurisdiction over the matter. If the state courts will not hear the matter, who will grant relief?
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> "If state courts cannot maintain class action suits with nonresident plaintiffs, can the 'small man' find legal redress in our modern society which increas-

> ingly exposes people to group injuries for which they are individually unable to get adequate legal redress, either because they do not know enough or because such redress is disproportionately expensive? (See A. Homburger, State Class Actions and the Federal Rule, 71 Colum. L. Rev. 609, 641-643 [1971].)
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> "The appellant argues this action should be brought in several different state courts. This risks inconsistent adjudications for a class which is otherwise treated alike. Furthermore, the statute of limitations has run in Oklahoma and Texas. The United States Supreme Court has held the commencement of a class action suit tolls the applicable statute of limitations as to all members of the class. (*American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 38 L.Ed.2d 713, 94 S.Ct. 756, reh. denied 415 U.S. 952, 39 L.Ed.2d 568, 94 S.Ct. 1477; and *Eisen v. Carlisle & Jacquelin, supra.*) However, if in this action Kansas is without jurisdiction over class plaintiffs in other states, this action would not toll the statute of limitations in those states." 222 Kan. at 544-45.

See also Newberg on Class Actions § 1206c.

These comments are equally applicable to the instant lawsuit. Phillips argues this action should be brought in several different state courts. This is merely an effort to "divide and conquer" as a strategy to avoid liability to individual royalty owners. If state courts cannot entertain class action suits involving nonresident plaintiffs, the effectiveness of the class action machinery is destroyed. Furthermore, the statute of limitations has run in all other states where leases involved in this lawsuit are located. If the in personam claims of nonresident plaintiff class members are dismissed from this action, those persons would be barred from recovering on their claims elsewhere.

This decision does not usurp the authority of other states where leases involved in this lawsuit are located to regulate transactions within their borders as Phillips argues. To our knowledge, no claims for interest on suspense royalties withheld by Phillips under the FPC rulings involved here have been asserted in any other forums on behalf of either individual royalty owners or as a plaintiff class of royalty owners. In Newberg on Class Actions, § 1206d, the author discusses the use of statewide class actions in several states as an alternative to a nationwide class:

> "Several statewide class actions, by definition, create a multiplicity of actions where formerly there was one. The waste of judicial resources in these circumstances is obvious, even assuming the doubtful proposition that plaintiffs and lawyers to represent them will be found who will initiate these state class actions in all affected states before the statute of limitations period has expired, and that all states with these suits have receptive class rules and will certify appropriate classes. The risk of inconsistent adjudications for a class which otherwise is treated alike, swells with each new statewide class commenced. State courts which have certified multistate classes have generally recognized the unsuitability of requiring a class action to be brought in several different state courts.
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> "Finally, exclusion of non-residents from the class solely on the ground of their non-residency may be an unconstitutional discrimination against non-residents with respect to access to this state's courts, in violation of the Privileges & Immunities Clause of the United States Constitution. Each state court system, while possessing its own jurisdiction, is nevertheless part of a larger network of courts of the several states."

See also 3B Moore's Federal Practices ¶ 23.35.

Phillips argues that jurisdiction over the nonresident plaintiffs cannot be based on their receiving notice of a class action and failure to opt out of the action, because a state cannot compel a nonresident to take affirmative action to avoid its jurisdiction. This same "bootstrap" argument was rejected by the Court in *Shutts I*:

> "Phillips argues our notice statute which allows a party to 'opt-out' of a class action suit cannot be used to 'bootstrap' jurisdiction of the court. Suffice it to say the federal rules and our rule regarding class actions are the result of a conscious choice to decide between provisions allowing parties to 'opt-out' or 'opt-in.' A determination was made to follow the 'opt-out' procedure to bind the greatest number of people. (See Proposed Rules of Civil Procedure, 39 F.R.D. 69, 105 [1966]; Cohn, The New Federal Rules of Civil Procedure, 54 Geo. L.J. 1204, 1226 [1966]; and Staff Studies Prepared for the National Institute for Consumer Justice on Consumer Class Action, pp. 138, 149 [1972].)
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> "Phillips argues our class action statute does not give the putative class member an absolute right to 'opt-out' as does Federal Rule No. 23(c)(2)(A). K.S.A. 60-223(c)(2) provides in pertinent part:
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> "'. . . [T]he court shall exclude those members who, *by date to be specified*, request exclusion, unless the court finds that their inclusion is essential to the fair and efficient adjudication of the controversy and states its reasons therefor. . . .' (Emphasis added.)
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> "Phillips argues by removing the choice of the putative class member to 'opt-out' of the class, it was the intent of the rule to apply to persons over whom the court already had jurisdiction. We do not think such a convoluted conclusion logically follows. The

> language simply gives the court the power to deny exclusion to class members, be they residents or nonresidents of Kansas, whose inclusion is essential to the fair and efficient adjudication of the controversy. However, we need not examine this section in great detail. (See Staff Studies Prepared for the National Institute for Consumer Justice on Consumer Class Action, *supra* at 145-146.)." 222 Kan. at 555.

We must next determine whether the procedural due process guarantees of reasonable notice and adequate representation were met. Phillips maintained records in their computer system of the names and addresses of all royalty owners affected by FPC Opinions Nos. 699, 749 and 770, and the amount of additional royalties paid to each. Pressure-sensitive mailing labels provided by Phillips, listing the known names and addresses of the approximately 33,000 royalty owners, were used by the plaintiffs to send notice of the class action to the potential class members by first class mail. The notices contained a request for exclusion which could be used by the royalty owners to opt out of the class. No notice by publication was used. Those royalty owners who opted out of the class and to whom notice could not be delivered were excluded from the class. Therefore, all royalty owners included in the class received notice and chose to remain in the class. Reasonable notice was given which fully complied with K.S.A. 60-223 and Fed. R. Civ. Proc. 23. The notice satisfied jurisdictional and constitutional due process requirements.

In examining whether adequate representation was accorded the absent resident and nonresident plaintiffs by the named representatives, we are mindful of the following discussion in *Shutts I*:

> "Where inadequate representation is established, courts have denied *res judicata* effect to class action judgments. (See *Research Corp. v. Pfister Asso-*

ciated Growers, Inc., 301 F. Supp. 497 [N.D. Ill. 1969]; and *Gonzalez v. Cassidy*, 474 F.2d 67 [5th Cir. 1973].)

"The class action is premised on the theory that members of the class who are not before the court can justly be bound because the self-interest of their representative coincides with the interest of the members of the class and will assure adequate litigation of the common issues. Where the interests of absent class members have not been adequately represented, binding them by the class judgment would seem to offend the requirements of due process. (*Hansberry v. Lee*, [311 U.S. 32, 85 L.Ed. 22, 61 S.Ct. 115 (1940)].] Notice to absent members of the class in this regard is particularly important, for it is the greatest single safeguard against inadequate representation. (*Mullane v. Central Hanover Tr. Co.*, [339 U.S. 306, 314, 94 L.Ed. 865, 70 S.Ct. 652 (1950)].)" 222 Kan. at 556.

In 7 Wright & Miller, Federal Practice and Procedure: Civil § 1765, p. 618 (1972), the author states:

"In most contexts, notice of the action is the touchstone that satisfies due process; the notice must be sufficient to give the party an opportunity to appear and join in the lawsuit or to challenge the claims of representation . . . . Thus a number of courts have held that the crucial determinant of due process is not notice but whether the putative class plaintiff or plaintiffs will fairly and adequately protect the interests of those whom they claim to represent."

What constitutes adequate representation is a question of fact to be determined by the trial court based upon the circumstances of each case. The decision should not be disturbed on appeal absent a showing of an abuse of discretion. 7 Wright & Miller, Federal Practice & Pro-

cedure: Civil § 1765; 3B Moore's Federal Practice ¶ 23.07[1]; *Helmley v. Ashland Oil, Inc.*, 1 Kan. App. 2d 532, 535, 571 P.2d 345, *rev. denied* 222 Kan. 749 (1977). Moreover, the law does not require that a named plaintiff be the perfect class member or even the best available. In determining the adequacy of the representative the trial court should consider: (1) whether there is adequate competent counsel; (2) whether the litigants are involved in a collusive suit; (3) whether the interests of the named parties are conflicting with or are antagonistic in any way to the interests of the other members of the class; (4) whether the named representatives' interests are coextensive with the interests of the other members of the class; (5) the quality of the named representatives, not the quantity; and (6) the extent of the named representatives' interests in the suit's outcome. See 7 Wright & Miller, Federal Practice & Procedure: Civil §§ 1765-1769; 3B Moore's Federal Practice, ¶¶ 23.07[1]-23.07[4]; *Helmley v. Ashland Oil, Inc.*, 1 Kan. App. 2d at 535; *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 562-63 (2d Cir. 1968); *Miner v. Gillette Co.*, 87 Ill. 2d at 14.

Considering these factors it is clear the class members were competently and adequately represented by the named representatives and their attorneys. The same attorney who was recognized in *Shutts I* as having done a "superior job in briefing this action and in arguing and briefing the law on this appeal" (222 Kan. at 557) represents the named representatives in the instant action. Counsel is said to be qualified to act for the representatives of the class, and therefore the class itself, if he is experienced in the particular type of litigation before the court. 7 Wright & Miller, Federal Practice and Procedure: Civil § 1766, p. 634. There is nothing in the record to suggest the class is not being competently represented by its counsel in this action, nor that the parties are involved in a collusive suit.

The named representatives and class members have identical interests in the lawsuit. Before the named representatives' status can be defeated the defendant must show a conflict exists between the representatives and class members which goes to the very subject matter of the litigation. *Helmley v. Ashland Oil, Inc.*, 1 Kan. App. 2d at 536, and case cited therein. Recovery for interest on the suspense royalties, which both the named representatives and the class members seek, is the heart of this action. No conflicting or antagonistic interests exist between the representatives and class members.

The coextensiveness factor requires only that the representatives and class members "share common objectives and legal or factual positions." 7 Wright & Miller, Federal Practice and Procedure: Civil § 1769, p. 655; *Helmley v. Ashland Oil, Inc.*, 1 Kan. App. 2d at 536. The fact that a defense may be asserted against the named representatives, as well as some other class members, but not the class as a whole, does not destroy the representatives' status. Here, a coextensiveness of interests exists between the representatives and class members to recover interest which is due them on suspense royalties withheld by Phillips.

The various authorities agree that whether the class members are adequately represented by the named plaintiffs depends on the quality of the representation, rather than the number of representative parties as compared with the total membership of the class. 7 Wright & Miller, Federal Practice & Procedure: Civil § 1766; 3B Moore's Federal Practice ¶ 23.07[4]; *Eisen v. Carlisle & Jacquelin*, 391 F.2d at 562-63. The use of a percentage test to determine whether absent parties will be fairly represented often would work to defeat the purpose of the class action device: to enable litigants with small claims to vindicate their rights. 7 Wright & Miller, Federal Practice & Procedure: Civil § 1766; *Eisen v. Carlisle & Jacquelin*, 391 F.2d at 563. Similarly, the size of the representatives' personal claims should not be dispositive

of the question whether the class is adequately represented, since requiring the class representatives to have a large interest in the dispute would thwart one of the basic purposes of such action. 7 Wright & Miller, Federal Practice & Procedure: Civil § 1767; 3B Moore's Federal Practice ¶ 23.07[4]. The quality of representation embraces both the competence of the legal counsel of the representatives and the stature and interest of the named parties themselves. Generally the representatives must be of such a character as to assure the vigorous prosecution or defense of the action so that the members' rights are certain to be protected. 7 Wright & Miller, Federal Practice & Procedure: Civil § 1766.

It is true that individual interests of the three named representatives are small when compared with the claims of the class as a whole. However, the representatives have sufficiently demonstrated a willingness to pursue this action to assure the class members' rights will be protected. As the named representative in *Shutts I*, Irl Shutts has more than shown his ability to adequately represent the class as a whole and prosecute the action through the entire judicial process to ensure the class members' claims are vindicated. There is nothing to indicate this action would not be pursued as vigorously as the action involved in *Shutts I*.

Based on the foregoing discussions, we find the procedural due process guarantees of reasonable notice and adequate representation were afforded the absent nonresident plaintiff class members.

Phillips contends the instant action should be dismissed because Kansas does not have a "legitimate interest" in entertaining this action. Phillips focuses on the following caveat expressed in *Shutts I*:

> "[T]his opinion should not be read as an invitation to file nationwide class action suits in Kansas and overburden our court system. Concepts of manage-

> ability in terms of our Kansas class action statute, the nature of the controversy and the relief sought, the interest of Kansas in having the matter determined, and the class size and complexity will have to be applied." 222 Kan. at 557.

Applying these factors, the court stated:

> "Kansas has a legitimate interest in adjudicating the common issue herein because Kansas comprises the largest physical area included in the FPC designated Hugoton-Anadarko area where Phillips is doing business and producing gas which it sells in interstate commerce. All of the gas royalty owners in the Hugoton-Anadarko area have leases with Phillips and a common interest in the money collected by Phillips as 'suspense royalties' from the sale of gas in the designated area. . . . All of the gas royalty owners in the Hugoton-Anadarko area have a right in common with each other, in the equivalent of a common fund, to claim damages for commingling and use of the 'suspense royalties' by Phillips, payable as interest, and they have a contact with Kansas by reason of such common interest." 222 Kan. at 357-58.

Phillips argues that because such a small percentage of the total number of leases involved are located in Kansas, and only a small percentage of the royalty owners affected are residents of Kansas, no "affiliating circumstances" exist which provide Kansas with a legitimate interest in entertaining this action. The factor emphasized in *Shutts I*, that Kansas comprised the largest portion of the areas affected by the FPC orders, is not present here.

Phillips likens the instant action to *Feldman v. Bates Manufacturing Co.*, 143 N.J. Super. 84, 362 A.2d 1177 (1976), which the court in *Shutts I* found presented an "excellent example" of a "*factual situation* in which a

trial judge applying our class action statute should deny certification of a class action, where nonresident plaintiff class members are involved." 222 Kan. at 557. However, the present action, like *Shutts I*, is readily distinguishable from the situation presented in *Feldman*. In *Feldman* a resident of New Jersey brought an action against a Delaware corporation to compel the corporation to convert preferred stock to common stock. Addressing the issue of jurisdiction by the New Jersey court over the class action, the *Feldman* court indicated that without "affiliating circumstances" between *the forum and litigation*, such as a "common trust fund," the judgment in a plaintiff class suit could not bind the nonresident class members. In dismissing the lawsuit for lack of jurisdiction, the court emphasized that the defendant was a Delaware corporation, the defendant was not authorized to do business and had no assets in New Jersey, no "common fund" existed within the state in which the nonresident plaintiff class members had an interest, the nonresident plaintiff class members had no other contacts with the forum, and New Jersey had no special interest in supervising the conduct of the defendant corporation's business which would justify assuming jurisdiction. The fact that only 31 of the 295 class members were residents of New Jersey was not specified by the *Feldman* court as being a significant factor in the decision. The court did emphasize that Delaware, the defendant's domiciliary state, was fully capable of providing a uniform determination of the issues involved. In the case at bar, Phillips, an Oklahoma corporation, conducts business and holds assets in Kansas. The State of Kansas has an interest in supervising the conduct of Phillips' business in this state, and therefore affiliating circumstances exist between the forum and the litigation not present in *Feldman*, which justifies the assertion of jurisdiction by this court over the instant action.

When considering the manageability of class actions filed in our state courts, courts should give equal consid-

eration to all of the factors set forth in *Shutts I*. The interest of the forum in having the matter determined is of no greater significance than the other considerations. As in the prior *Shutts* case, the manageability of this class is demonstrated by the absence of basic issues of fact. The material facts have been stipulated by the parties and the names, addresses and suspense royalty amounts for each royalty owner are readily available in Phillips' records. All royalty owners, regardless of residency, particular lease provisions or royalty agreements, were given the same notices by Phillips and were treated uniformly when suspense royalties and interest were withheld. Although a larger class is involved than in *Shutts I*, the legal issues presented are substantially the same. While these issues are complex they were thoroughly reviewed in *Shutts I*, thereby providing the trial court in the present case with substantial guidelines pertaining to the law applicable to these issues. If anything, this case is more manageable than *Shutts I* because of the legal principles enunciated in that opinion. The nature of the controversy and relief sought are not unfamiliar in this state. Our appellate courts have reviewed numerous cases in recent years involving interest on suspense royalties. *See Nix v. Northern Natural Gas Producing Co.*, 222 Kan. 739, 567 P.2d 1322 (1977), *cert. denied* 434 U.S. 1067 (1978); *Sterling v. The Superior Oil Co.*, 222 Kan. 737, 567 P.2d 1325 (1977), *cert. denied* 434 U.S. 1067 (1978); *Maddox v. Gulf Oil Corporation*, 222 Kan. 733, 567 P.2d 1326 (1977), *cert. denied* 434 U.S. 1065 (1978); *Lightcap v. Mobil Oil Corporation*, 221 Kan. 448, 562 P.2d 1, *cert. denied* 434 U.S. 876 (1977); *Helmley v. Ashland Oil, Inc.*, 1 Kan. App. 2d 532; *Gray v. Amoco Production Company*, 1 Kan. App. 2d 338, 564 P.2d 579 (1977), *modified* 223 Kan. 441 (1978).

Finally, although only a few leases involved in the instant litigation are located in Kansas, hundreds of Kansas resident royalty owners were affected under the three FPC opinions. Many of these Kansas class plain-

tiffs received royalties from leases located in other states. While this may constitute only a small percentage of the total number of class members, this state has a significant interest in protecting the rights of these royalty owners both as individual residents of this state and as members of this particular class of plaintiffs. Oil and gas production is a significant industry in this state. Kansas has an interest in ensuring that out-of-state oil and gas companies which do business within this state do not conduct themselves unlawfully or violate the rights of resident royalty owners to whom the company is responsible. This action involves the equivalent of a "common fund" because of the suspense royalties commingled and used by Phillips during the pendency of the FPC orders. All of the gas royalty owners involved in this action have the common right to claim damages involving this "common fund." Therefore, all of these royalty owners have a substantial contact with Kansas by reason of their interest in the common fund which is the subject matter of this lawsuit.

Phillips and *amicus* Sun Oil Company also argue that the "commonality" requirement to K.S.A. 60-233(*a*) is not met in this case. Sun Oil Company points to the language in *Shutts I* that "[w]hen liability is to be determined according to varying and inconsistent state laws, the common question of law or fact prerequisite of K.S.A. 60-223(*a*)(2) will not be fulfilled," 222 Kan. at 557. The *amicus* brief contends "this action involves eleven states and a maze of different interest laws."

As we have heretofore noted, common questions of fact and law exist in this case. All of the parties are similarly situated and no basic questions of fact exist, as the material facts have been stipulated by the parties. The subject matter of the litigation is the plaintiff class members' claim for interest on the suspense royalties. The requirement of 60-223(*a*)(2) is couched in the disjunctive: common question of fact *or* law. It does not,

therefore, require the presence of both a common question of fact *and* a common question of law. See *Miner v. Gillette Co.*, 87 Ill. 2d at 17; 3B Moore's Federal Practice ¶ 23.06-1; 7 Wright & Miller, Federal Practice & Procedure: Civil § 1763. It has further been recognized that where common questions of fact predominate and conflicting laws apply, the plaintiff class members may be divided into subclasses to which the appropriate laws may be applied. *Miner v. Gillette Co.*, 87 Ill. 2d at 17; 3B Moore's Federal Practice ¶ 23.45[2]; Newberg on Class Actions § 1206h.

Phillips next contends it is not liable for interest on suspense royalties attributable to gas used by Phillips rather than sold to a pipeline company. If the increased rates were disapproved by the FPC, Phillips would not be required to make refunds to purchasers on gas used rather than sold, because no increased rate was actually collected on such gas. Phillips argues, therefore, additional royalties attributable to gas it consumed did not belong to royalty owners until the increased rates were approved by the FPC. Phillips maintains this case is distinguishable from *Shutts I* for this reason and therefore it does not owe interest on additional royalties for gas it used prior to the time the rate was approved.

Relying on *Lightcap v. Mobil Oil Corporation*, 221 Kan. 448, Syl. ¶ 12, the court in *Shutts I* awarded prejudgment interest to royalty owners whose suspense Royalties had been retained and used by the defendant, Phillips Petroleum Company, during the pendency of the FPC rate approval process, based upon the principle that the doctrine of unjust enrichment prevents one from profiting or enriching himself at the expense of another contrary to equity. The court held:

> "Where a party retains and makes actual use of money belonging to another, equitable principles require that it pay interest on the money so retained and used."

"In an action by royalty owners against their producer for interest on royalties held in 'suspense,' pending determination of lawful rates by the Federal Power Commission upon application of the producer for increased rates, it is held that interest on suspended royalties may be recovered for the period of time such royalties remained in the control of, and were available for use by, the gas producer during the pendency of FPC proceedings and related litigation regarding the determination of applicable lawful rates for gas sales, and litigation regarding the determination of issues involved in this appeal, all as more particularly set forth in the opinion." 222 Kan. 527, Syl. ¶¶ 20, 21.

As set forth more fully in the opinion, the court reasoned:

"In the case at bar, beginning on June 1, 1961, Phillips withheld the share of the class members of the increased gas prices subject to refund. Thereafter, while the FPC slowly ground out FPC Opinion No. 586, Phillips deposited the increased rate monies in its general accounts and commingled them with other funds without giving further notice to the royalty owners. *What is significant is these gas royalty suspense monies never did or could belong to Phillips.* If the FPC disapproved the proposed increased rates the pipeline companies (gas purchasers of Phillips) would receive this suspense money *and the interest which Phillips had agreed to pay by its corporate undertaking.* If the FPC approved the proposed increase rate, the 'suspense royalties' would go to the gas royalty owners.

. . . .

"[W]e do not believe that Phillips may enrich itself in the absence of any contractual sanction or seize upon the procedural complexities of the FPC to

avoid responsibility for an appropriate measure of damages, expressed in terms of interest. . . .

. . . .

". . . Phillips expressly contracted to pay a percentage of the *price received* for the sale of gas on which month-by-month payments to the royalty owner were to be based. Although the money received by Phillips for the sale of gas in excess of the established rates pending FPC determination was subject to possible refund, *none of the excess was contractually excluded from the price received by Phillips and on which payment to the royalty owner was contractually based.* There was no rule or regulation which prohibited Phillips from including the excess in the amount on which calculation of payment to the royalty owner on a month-to-month basis was made. (*Stahl Petroleum Co. v. Phillips Petroleum Co.*, [550 S.W.2d 360 (Tex. Civ. App. 1977)].) But if Phillips chose to withhold payments of contractually owing 'suspense royalties' pending FPC approval, as authorized by prior federal case law, that did not relieve Phillips of its contractual obligation to pay the *price received* with interest for the period of time the suspense money was held and used by Phillips." (Emphasis in original.) 222 Kan. 559-62.

In its discussion the court pointed out that Phillips made substantial profit from the use of the suspense money during the period in question.

In the present case, as in *Shutts I*, Phillips filed a corporate agreement and undertaking with the FPC, pursuant to 18 C.F.R. § 154.102(c)(2) (1983), to refund, to Phillips' purchasers of gas, *with interest*, the portion of the increased rates not approved by the FPC. The rate of interest applicable under the corporate undertaking in the event of a refund is seven percent (7%) per annum prior to October 10, 1974, nine percent (9%)

per annum thereafter until September 30, 1979, and thereafter at the average prime rate, compounded quarterly, as provided by 18 C.F.R. 154.67 (1983).

The trial court made the following ruling on this issue:

> "Also, Phillips uses, in some instances, substantial portions of the gas produced in its own operations, and therefore, does not sell to a pipeline company.
>
> "Phillips asserts that as a result of this, the pay adjustments do not necessarily belong to somebody else, but either belong to Phillips as a consumer, in the case of disapproval of the anticipated rate raises, or if approved, to the royalty owners.
>
> "The difficulty with Phillips' position is that they assume, with their contractual or lessee obligations, that by using the gas themselves, they can avoid the obligation imposed under the original Shutts case.
>
> "The court finds no basis to distinguish their obligations when they are their own consumer as a lessee, then when they are, as lessees in good faith, marketing the gas to pipelines or other consumers."

Phillips argues, in substance, that because it did not actually collect the increased price on the gas which it used rather than sold, it was not unjustly enriched by using money potentially belonging to the royalty owners. Phillips distinguishes this case from *Shutts I* because in that case the gas royalty suspense monies never did or could belong to Phillips, as they would either be passed along to the royalty owners if the increases were approved or refunded to the purchasers if disapproved. Here, if the increased rates were disapproved, Phillips would have no obligation to refund any amount to any purchaser on gas it used.

This argument is without merit for several reasons. Phillips acknowledges in its brief that its obligation to

pay royalties under the various gas royalty agreements and casinghead gas contracts exists without regard to the actual disposition of the gas. The royalty is based on the volume of gas multiplied by the reference price which exists even if only one Mcf of gas is sold in the designated area. Royalties are paid on gas consumed by Phillips on the basis of prices received from the sale of other gas to a pipeline company. Therefore, whether the gas is consumed by Phillips or sold to a pipeline company, the amount of royalties paid to the royalty owners to whom Phillips accounts is based upon the actual price received by Phillips on the sale of gas as established by the FPC.

It is true that if the increased rates were not approved by the FPC Phillips would not be obligated to make any refunds to purchasers on the gas it used, since it had not sold such gas and did not receive an increased rate subject to refund. By consuming a portion of the gas received from its leasing operations, however, Phillips became, in effect, the purchaser of that gas. Where, as here, the increased rate is approved by the FPC, Phillips owed additional royalties to the royalty owners based on the increased rates for the period during which the royalties were suspended, *whether the gas was purchased by a pipeline company or consumed by Phillips.*

The retention of the suspense royalties by Phillips pending FPC determination was lawful. (See cases cited at 222 Kan. at 559.) Phillips, however, was not prohibited from paying royalties during the pendency of the FPC determination based on the increased rate on gas it either used or sold. These increased royalties would be subject to refund from future payment of royalties if ultimately the increase was not approved. By choosing to withhold payment Phillips was allowed the use of the suspense monies during the suspension period which rightfully belonged to the royalty owners, and the royalty owners, in turn, were deprived of receiving and using

those monies during that time. The trial court expressly found Phillips commingled the suspense monies with the other monies under its control and benefitted from the use of such monies by either investing it or using it as needed for day-to-day business operations. If Phillips had paid the royalty owners the increased rate on a month-to-month basis during the rate approval process, equity dictates it would be entitled to a refund with interest if those rates were disapproved, whether the gas was sold by Phillips to a pipeline company or used by Phillips in its operations. See *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480, 484 (Tex. 1978). Conversely, Phillips was not entitled to enrich itself "in the absence of any contractual sanction or seize upon the procedural complexities of the FPC to avoid responsibility for an appropriate measure of damages, expressed in terms of interest." 222 Kan. at 561.

Phillips contends that because it would not be obligated to refund increased prices to purchasers on gas it used where the increased rates were disapproved, this case falls within the rule of *Columbian Fuel Corp. v. Panhandle Eastern Pipe Line Co.*, 176 Kan. 433, 271 P.2d 773 (1954), which denied payment of interest on an amount due from a gas purchaser under an interim order of the Kansas Corporation Commission. In *Shutts I* this case was distinguished as follows:

> "This answers Phillips' contention that *Columbian Fuel Corp. v. Panhandle Eastern Pipe Line Co.*, 176 Kan. 433, 271 P.2d 773, and other cases prevent the payment of interest on unliquidated sums. In *Columbian Fuel* an interim rate increase was approved by the Kansas Corporation Commission on natural gas sold to the buyer. The buyer was permitted to withhold the increase upon securing a bond. The seller brought suit seeking to collect interest on the amount withheld. This court noted the temporary nature of the Kansas Corporation Commission order and disallowed interest. The court held:

> " 'In the absence of an agreement therefor interest may not be recovered on a claim as long as the validity of the claim is unadjudicated and the amount on which interest could be computed, if the claim be declared valid, remains wholly uncertain and unliquidated.' (Syl. 5.)
>
> "Here, of course, an agreement for the payment of interest on the part of Phillips is clearly present. Further, the suspended payments in *Columbian Fuel* did not necessarily belong to another. Here the 'suspense royalties' belong either to the royalty owners or the pipeline companies. Thus we reaffirm our decision in *Lightcap*, [221 Kan.] at 466, distinguishing *Columbian Fuel*." 222 Kan. at 565.

The significant fact distinguishing *Columbia Fuel* from *Shutts I* is also present in this case: that an agreement for the payment of interest on the part of Phillips is clearly present. In addition, in *Columbian Fuel* essential undetermined factors existed, which is not true in the instant case. In that case the main undetermined issues were first, whether the buyer was liable for the cost of gathering and delivering the gas, and second, what was the cost, which involved the question of what factors to consider in determining such cost. Here there was no dispute that if the rate increases were approved by the FPC Phillips was liable to the royalty owners for the additional royalties based on the increased rate, and the amount due each royalty owner in that instance. As such it was not an unliquidated claim and interest could be easily computed.

Whether Phillips sells the gas at the increased price, actually receiving the increased amount, or uses it during the suspension period, it has the benefit of the lower price paid the royalty owners and is enriched by the use of the money until the increase is approved and the increased price is paid out as suspended royalties. Phillips is there-

fore obligated to pay interest on the additional royalties paid out whether the gas is sold or used.

Phillips next contends it is not liable for interest to some royalty owners under "without interest" and release clauses contained in casinghead gas contracts entered into which producers from which Phillips purchases gas. One provision permits Phillips to withhold, without interest, monies subject to FPC approval. It reads:

> "The price per Mcf that Buyer [Phillips] receives under the 'Sales Contract' is, or may be, subject to regulation by the Federal Power Commission. The phrase 'price per Mcf that Buyer receives,' as used in this contract, shall mean only that portion of the price exclusive of any tax reimbursement then being collected by Buyer under the Sales Contract which is not subject to possible future refund by Buyer. If Buyer is later determined to be entitled to retain all or part of the amount collected subject to refund and is relieved from all further obligation to refund with respect thereto, Buyer shall retroactively recalculate the price payable hereunder and shall pay Seller the difference, *without interest*, between the amount previously paid Seller hereunder and the amount which would have been payable based on the price which Buyer is so permitted to retain." (Emphasis added.)

The second clause purports to extinguish prior claims for money due for gas sold under prior contracts.

Under each of these contracts the producers warrant title to the gas purchased by Phillips. Under many of these contracts Phillips has assumed the producer's responsibility to distribute the royalties from the purchase price of the gas to the royalty owners at the direction of the producer. This provision states:

> "For the account and on behalf of Seller, Buyer agrees to distribute such royalties, overriding royal-

ties, bonus payments and production payments, as Seller shall from time to time direct, accruing from the production and sale of gas hereunder. Buyer shall deduct such payments from the amounts due Seller hereunder. Seller agrees to indemnify and hold Buyer harmless from loss and damages resulting from payments made pursuant to Seller's direction. Notwithstanding, Seller may elect initially to make all payments accruing from the production and sale of gas hereunder to the owners of all royalties, overriding royalties, bonus payments and production payments and to hold Buyer harmless therefrom in which event Buyer shall have no obligation with respect to disbursement of such payments as first above provided."

The trial court made the following findings of fact and conclusions of law relevant to this issue:

"Gas royalty agreements, casinghead gas purchase contracts, renewal contracts and division orders which purport in any way to relieve Phillips from the payment of interest on suspense royalties are not valid as far as royalty owners are concerned or binding on this court. The purported contracts between gas producers and Phillips should not be binding on the outside royalty owners where Phillips had use of the outside royalty owners' money and paid them no interest. (*Shutts* [222 Kan. at 530, Syl. ¶¶ 21, 22].) The outside royalty owners and the inside royalty owners are in the same class and Phillips owed them the same duties.

"As to the 'without interest' casinghead gas contracts, here again Phillips attempted by contract with the gas purchaser to eliminate its liability for interest. Such contracts are not binding on the outside gas royalty owners for the reasons stated.

. . . .

> the best prices obtainable at the place where the gas was produced. The insertion in the division orders of matters contrary to the oil and gas leases, or contrary to the law, cannot be unilaterally imposed upon the lessor by the lessee or the purchaser. Here the unilateral attempt by Gulf in the division orders to amend the oil and gas leases, and thereby deprive the royalty owners of interest to which they were otherwise entitled, was without consideration. Therefore, the provisions in the division order regarding waiver of interest are null and void as determined by the trial court." 222 Kan. at 735.

All of the royalty owners involved in this action are paid royalties directly by Phillips, whether under a regular gas royalty agreement between Phillips and the royalty owners or under a casinghead gas contract between Phillips and a producer where Phillips has agreed to assume the producer's duty to pay royalties directly to the royalty owner. As pointed out by Phillips in its brief, the usual pricing provision under the casinghead gas contract is based on the weighted average price received by Phillips in a price reference area from the sale of gas to a pipeline company as established by the FPC. This is the same royalty which would be paid to royalty owners under typical gas royalty agreements between Phillips and the royalty owners.

These casinghead gas contracts are not signed by the royalty owners nor is there evidence of any consideration given for the withholding of additional royalties by Phillips without interest. These contracts are entered into between *Phillips and producers of gas.* Some of these contracts purport to waive any existing claim by the producers against Phillips and allow Phillips to withhold amounts *owed the producers* without interest. However, these provisions, entered into between Phillips and the producers, cannot unilaterally deprive royalty owners of interest which they would otherwise be entitled to

receive under casinghead gas contracts in which the provisions do not appear. There is no evidence the producers or Phillips bargained with the royalty owners or gave any consideration for the relinquishment of the right to receive interest on additional royalties withheld by Phillips. These royalty owners were treated by Phillips the same as royalty owners to whom they account under regular gas royalty agreements. In the notices of the suspended payments sent by Phillips to *all* royalty owners, no distinction was made between royalty owners who receive royalties from Phillips under gas royalty agreements and those who receive royalties under casinghead gas contracts. All suspense monies were withheld and paid out to all royalty owners on a uniform basis. All royalty owners were notified of the right to receive the additional royalties during the suspension period if an acceptable indemnity was filed with Phillips. Phillips cannot deprive the royalty owners of their right to interest by entering into contracts with producers of gas purporting to waive the *producer's* right to receive interest. The provisions of the casinghead gas contracts cannot be read to waive the royalty owners' right to receive interest which they otherwise are entitled to where the contracts are not signed by the royalty owners and there is no consideration.

The appellant next contends this court should look to the law of each state where leases involved in this action are located and determine, based on conflict of law principles, whether interest is recoverable on royalties attributable to those leases and the applicable rate of interest under the laws of the states where each lease is located. In *Shutts I* the interest laws of Kansas, Oklahoma and Texas were held not to apply because the statutes referred to situations where there was no agreement as to the applicable rates of interest. Phillips expressly contracted and agreed to pay a stated interest to gas purchasers on the refunded portions of the increased

price, pursuant to the corporate undertaking filed with the FPC. This agreement was found to establish an appropriate measure of damages to be awarded the royalty owners, expressed in terms of interest, for the commingling and use of suspense monies by Phillips. 222 Kan. at 565.

The trial court held the rate of interest to be applied in the instant case, both prejudgment and postjudgment, was the stated rate under the corporate undertaking filed by Phillips with the FPC. The trial court did not determine whether any difference existed between the laws of Kansas and other states or whether another state's law should be applied. Phillips contends the failure to examine the substantive law of other states regarding the award of interest and applicable interest rates violates its constitutional rights.

In *Shutts I* it was held the rate of interest set forth in the corporate undertaking established an appropriate measure of damages to compensate the plaintiffs for the unjust enrichment derived by Phillips from the use of the plaintiffs' money. In the instant case Phillips has not satisfactorily established why this court should not apply the rule enunciated in *Shutts I* and instead look to the law of each state where leases are located to determine whether damages should be based upon a rate different from that set forth in the FPC undertaking. The general rule is that the law of the forum applies unless it is expressly shown that a different law governs, and in case of doubt, the law of the forum is preferred. 16 Am. Jur. 2d, Conflict of Laws § 5. Where a state court determines it has jurisdiction over a nationwide class action and procedural due process guarantees of notice and adequate representation are present, we believe the law of the forum should be applied unless compelling reasons exist for applying a different law. All of the plaintiff class members in this lawsuit were given actual notice that this action was being brought

on their behalf in Kansas. The plaintiffs had the opportunity to opt out of the lawsuit, but chose to have their claims litigated in the Kansas courts. We have hereinbefore held the unnamed plaintiff class members were adequately represented in the lawsuit and that the forum has a significant legitimate interest in adjudicating the claims of the class members. The common fund nature of the lawsuit provides an excellent reason to apply a uniform measure of damages to the class as a whole, as each member of the class has been similarly deprived of the rightful use of his or her money. The plaintiff class members have indicated their desire to have this action determined under the laws of Kansas. Compelling reasons do not exist to require this court to look to other state laws to determine the rights of the parties involved in this lawsuit.

Phillips next contends, based upon the "United States Rule" followed in *Shutts I*, that only unpaid principal is owing the plaintiffs and therefore they have no basis upon which to seek recovery for "interest." Addressing this issue, the trial court found:

> "The position of Phillips that no interest is owed but only principal because the payments made must be first applied to interest under the U.S. Rule announced in *Shutts*, [222 Kan. 527], and therefore only principal is left owing, is without merit. The rules set forth in *Shutts*, [222 Kan. 527], allow a recovery under equitable considerations. Whether the recovery is for interest or principal is merely a strained construction of words. Plaintiffs are entitled to money for Phillips' use of their money, according to 18 CFR Section 154.67. The pleadings on file herein are conformed, if necessary, to meet the evidence presented."

This action is one for damages, expressed in terms of interest, to compensate the plaintiffs for the use of

their money by Phillips. No attempt was made by Phillips to compensate the royalty owners for the period of time they were deprived of the rightful use of their money while Phillips benefitted from its use. It is irrelevant whether the plaintiffs' action to recover damages for unjust enrichment was expressed in terms of "damages," "interest" or "principal." Phillips was not misled as to the basis of the plaintiffs' claim by their action framed as one seeking recovery of interest.

Finally, Phillips suggests this court should exercise its supervisory authority and establish guidelines for the award of attorney fees in nationwide class action suits brought in Kansas. Phillips asserts presently the practice in Kansas is for the attorneys representing the class to receive a designated percentage of the amount of the judgment recovered by the class. The amount of attorney fees awarded, however, does not increase the defendant's liability and is taken from the judgment received by the plaintiff class. The district court ruled the amount of attorney fees would be determined following a hearing after the judgment became final. Regarding attorney fees the district court made the correct ruling.

The amount of attorney fees awarded should be within the sound discretion of the trial court based upon guidelines established by this court. In 3B Moore's Federal Practice ¶ 23.91, the following criteria are suggested to be considered by the trial court in determining the size of attorney fees to be awarded in a class action:

> "(1) the number of hours spent on the case by the various attorneys and the manner in which they were spent;
>
> "(2) the reasonable hourly rate for each attorney;
>
> "(3) the contingent nature of success;
>
> "(4) the extent, if any, to which the quality of an attorney's work mandates increasing or decreas-

ing [the] amount to which the court has found the attorney reasonable entitled."

Citing *Lindy Bros. Bldrs., Inc. of Phila. v. American R. & S. San. Corp.*, 487 F.2d 161, 166-69 (3rd Cir. 1973). This list of considerations is not exclusive, however. Other considerations include the amount involved, as it determines the risk of the client and the commensurate responsibility of the attorney, and the result of the case, because that determines the real benefit to the client. Of major importance is the consideration of the benefit the lawsuit has produced. 7A Wright & Miller, Federal Practice and Procedure: Civil § 1803, p. 289-90; *Oppenlander v. Standard Oil Company (Indiana)*, 64 F.R.D. 597 (D. Colo. 1974). In *State of Illinois v. Harper & Row Publishers, Inc.*, 55 F.R.D. 221, 224 (N.D. Ill. 1972), the court recognized some attempt must be made by courts to suit the award of fees to the performance of the individual counsel in light of the time spent reaching a settlement, to prevent attorneys from taking advantage of class actions to merely obtain lucrative fees. See also 7A Wright & Miller, Federal Practice and Procedure: Civil § 1803, p. 292.

Even where there has been no objection to the amount of attorney fees requested, it is the responsibility of the court to determine the award to assure that the amount awarded is reasonable. The trial court must hold an evidentiary hearing so that it has before it sufficient information to make a fair and adequate fee award. 3B Moore's Federal Practice ¶ 23.91, p. 23-568. Many recent cases have required attorneys to produce detailed time records indicating the time expended by each lawyer and the nature of work done by each to allow the court to determine, among other things, the necessity for and quality of the work done. See, *e.g.*, *In Re Equity Funding Corp. of America Securities*, 438 F. Supp. 1303 (C.D. Cal. 1977); *Green v. Wolf Corporation*, 69 F.R.D. 568 (S.D. N.Y. 1976). This, however, is only to be used as a starting

point to determine the appropriate fee. 7A Wright & Miller, Federal Practice and Procedure: Civil § 1803, p. 267-69 (1983 Supp.). Wright and Miller suggest, in addition, that the court should consider the contingent nature of succeeding in the action, which would be awarded in addition to the allowance for the quality of counsel's work. The reasons for the contingency award are (1) the plaintiffs' lawyer will not receive any compensation until the lawsuit is concluded and then only if he has been successful in securing a judgment for his clients, (2) unless both of these conditions are met the attorney will receive nothing for his efforts and will not be reimbursed for his expenses, and (3) lawyers who actively litigate class action cases largely depend on court-awarded fees for their economic survival. 7A Wright & Miller, Federal Practice and Procedure: Civil § 1803, pp. 274-75 (1983 Supp.).

Finally, where the established guidelines are followed by the district court, appellate review should be limited to abuse of discretion. *Lindy Bros. Builders, Inc. v. Am. Radiator, Etc.*, 540 F.2d 102, 116 (3rd Cir. 1976).

On cross-appeal the appellees contend the postjudgment rate of interest which should be applied is the statutory postjudgment rate as set forth in K.S.A. 1983 Supp. 16-204, rather than the contractual rate pursuant to the FPC undertaking. This statute provides, in pertinent part:

> "(c) Any judgment rendered by a court of this state on or after July 1, 1982, shall bear interest on and after the day on which the judgment is rendered, at the rate of 15% annum."

In *Shutts I* the court determined that K.S.A. 16-204 (Weeks) required payment of eight percent interest on the judgment until paid. The contractual rate of interest contained in the corporate undertaking was applied only to the prejudgment interest owing from the date of the receipt of the royalties until the date of judgment. Under

our holding in *Shutts I* and K.S.A. 1983 Supp. 16-204, Phillips is required to pay fifteen percent per annum simple interest on the total amount of the judgment from the date of the judgment until paid.

Accordingly, the interest payable to the royalty owners in this case is the rate of interest set forth in Phillips' corporate undertaking with the FPC from the time Phillips first held royalties in suspense to the date of the judgment entered by the trial court and postjudgment simple interest at fifteen percent on the total amount of the judgment from the date of the judgment until paid.

The judgment of the lower court is affirmed as modified.

IN THE SUPREME COURT
OF THE STATE OF KANSAS

No. 83-55796-AS

IRL SHUTTS and ROBERT ANDERSON and BETTY ANDERSON, Individually and as representatives of certain others,

Appellee,

v.

PHILLIPS PETROLEUM COMPANY,

Appellant.

You are hereby notified of the following action taken in the above entitled case:

Motion for Rehearing.

DENIED.

Yours very truly,

LEWIS C. CARTER
Clerk, Supreme Court

Date May 11, 1984

IN THE DISTRICT COURT OF
SEWARD COUNTY, KANSAS

No. 79C113

IRL SHUTTS and ROBERT ANDERSON and BETTY ANDERSON, Individually, and as representatives of all producers and royalty owners to whom Phillips Petroleum Company made payment of suspended proceeds or royalties pursuant to Federal Power Commission Opinion Nos. 699, 699H, 749, 749C, 770 and 770A,

Plaintiffs,

vs.

PHILLIPS PETROLEUM COMPANY,

Defendant.

JOURNAL ENTRY OF JUDGMENT

ON the 27th day of January, 1983, this case comes regularly on for hearing and trial. Plaintiffs appear by and through W. Luke Chapin of Chapin, Penny & Goering, Chapin Building, Medicine Lodge, Kansas 67104; Ed Moore, Ginder & Moore, 202 South Grand, Cherokee, OK 73728; and Harold K. Greenleaf, Jr., P. O. Box 1039, Liberal, Kansas 67901. Defendant Phillips Petroleum Company appears by and through T. L. Cubbage, Phillips Petroleum Company, Bartlesville, Oklahoma 74004; James Yoxall, P. O. Box 1278, Liberal, Kansas 67901; Joseph Kennedy and Robert W. Coykendall, Suite 430, 200 West Douglas, Wichita, Kansas 67202.

THEREUPON, parties announce to the court that they are ready for trial; evidence is introduced; and the court takes the matter under advisement, asking for written suggested findings of fact and conclusions of law from the parties.

Thereafter and as of April 1, 1983, the court, having heard the evidence and having received suggested findings and conclusions from the parties, and being well and fully advised in the premises, renders its Memorandum Decision, which is made a part hereof by reference.

The court further finds and concludes as follows:

FINDINGS OF FACT

1) This action was filed in July, 1979, by plaintiff Irl Shutts (Shutts), a resident of Sun City, Barber County, Kansas, and by Robert Anderson and Betty Anderson, who are residents of Guymon, Texas County, Oklahoma. Shutts is the owner of gas royalty interests under five leases owned by defendant, Phillips Petroleum Company, in Texas and Oklahoma. Andersons are owners of gas royalty interests under a lease owned by Phillips in Oklahoma. (Pre-Trial Stipulation No. 1.)

2) This action was filed by Shutts and Andersons in behalf of themselves and all others of Phillips' gas royalty owners and producers seeking to recover interest on monies withheld by Phillips for a period of years pending approval by the FPC and the courts of certain rate increases on gas purchases. (Stipulation No. 2.)

3) The court has ordered that plaintiffs Shutts and Andersons are members of a class of approximately 33,000 royalty owners and overriding royalty owners who received additional or suspense royalties or overriding royalties from Phillips as a result of FPC (FERC) (Opinions Nos. 699, 749 and 770, pertaining to gas rates in nationwide gas rate proceedings. The court determined that producers should not be included in the class. Subsequent to the mailing of first class notice to the 33,000 potential class members, the size of the class was reduced to approximately 28,100 because approximately 3,400 class members elected to opt out and notice could not be delivered to approximately 1,500 other potential

class members. There has been no notice by publication in this case. (Stipulation No. 3.)

4) Beginning with FPC Opinion No. 699, the Federal Energy Commission began rate making nationwide rather than area wide as had been done previously. (Stipulation No. 4.)

5) Payments were suspended in part under FPC Opinion 699 from July, 1974 through July, 1976; notices went to royalty owners according to Roberts Deposition Exhibit 1 in March, 1975; No. 2 in November, 1975; No. 3 in December, 1975; and No. 4 in July, 1976. Total payouts to royalty owners were about $3,700,000.00. (C. A. Roberts Affidavit No. 4, Attachment B.) (Stipulation No. 5.)

6) Payments were suspended in part under Opinion 749 from January, 1976 through February, 1978; notices went to royalty owners according to Roberts Deposition Exhibit No. 7 in April, 1976; No. 8 in September, 1978. Total payouts to royalty owners were about $2,900,000.00. (C. A. Roberts Affidavit No. 4, Attachment B.) (Stipulation No. 6.)

7) Payments were suspended in part under FPC Opinion 770 from August, 1976 through July, 1977; notices went to royalty owners according to Roberts Deposition Exhibit 15 in September, 1977; No. 16 in March, 1978; No. 17 in December, 1978; and No. 18 in March, 1979. Total payouts to royalty owners were about $4,700,000.00. (C. A. Roberts Affidavit No. 4, Attachment B.) (Stipulation No. 7.)

8) The increased sales prices for the gas sales were collected by Phillips subject to a duty to refund the same to the purchasers in the event the courts failed to approve the sales price increases ordered by FERC. If the rates were not approved, Phillips would owe the purchasers interest at seven percent (7%) per annum unitl October 10, 1974, at nine percent (9%) per annum thereafter until September 30, 1979, and at the average

prime rate, compounded quarterly, thereafter on all that portion of the increased rate disallowed. (18 CFR 154.67 and Federal Reserve Bulletins.)

9) Until dates of suspension above stated, Phillips paid over to its gas royalty owners all of their fractional or percentage share of the rates being collected by Phillips, but through all or part of the periods of suspension Phillips withheld the royalty payments attributable to the price increases in Opinion Nos. 699, 749 and 770, unless the royalty owners put up an acceptable indemnity to repay the same with interest if the increased values were not approved by FPC; and Phillips so notified all of its royalty owners. A list of indemnity owners (royalty owners and producers) who were paid monies resulting from FPC Opinion Nos. 699, 749 and 770 pursuant to an indemnity agreement is shown at Roberts Deposition Exhibit No. 24 (4 pages). Stipulation No. 8.)

10) As to all gas royalty owners and overriding royalty owners to whom Phillips was accounting, Phillips collected all proceeds from the proposed increased rates including that fraction or percentage increase which belonged either to royalty owners or to purchasers and could in no event belong to Phillips. The money belonging to others was deposited to cash in Phillips' general account and commingled with its other funds during the suspension periods. (Barnett Deposition, Pages 4, 6, 7 and 8.)

11) On termination of the suspension periods above stated, Phillips again began paying all of its royalty owners and overriding royalty owners to whom is accounted, royalties based on the increased prices and paid the back royalties or suspense royalties on FPC monies. (Stipulation No. 9.)

12) Irl Shutts and Robert and Betty Anderson were among those royalty owners receiving checks for suspended royalties. (Stipulation No. 10.)

13) At the time of the payouts of suspended royalties and overriding royalties, Phillips neither paid nor offered to pay any interest for the use of the money nor did Phillips in the notice sent with the check say anything about interest or how long the money had been held or used by Phillips. (Phillips Answers to Interrogatories, Set I, Interrogatory No. 5: "Answer: No interest was paid."; see also notices attached to Pre-Trial Order.)

14) The money that Phillips had in its possession due to FPC suspended monies would be commingled with all other monies that Phillips had under its control. (Gerald R. Barnett Deposition, Pages 4 and 7.) "It's our job to see how much money is needed in the bank for day to day operations and then the excess, it's our job to find the appropriate places to invest it for different periods of time. The income off of those investments is reflected as some type of investment income in the annual report. Phillips invests its excess money in substantially numerous different types of investments: commercial paper, C.D.'s, overnight funds, fed funds, treasury bills. Each day we look at all of those rates and compare what you can get in the different instruments. Whenever Phillips needs money in its general operating account, as when FPC money is to be paid from Phillips to various owners, then, if that requires extra cash from another investment, that investment is liquidated and the money put into the operating account." (Barnett Deposition.)

15) The 1978 annual report of Phillips is a consolidated report of Phillips and its various subsidiaries. Barnett Deposition Exhibit 28, Page 44, shows net income of Phillips increasing from $130,000,000.00 in 1969 to $710,500,000.00 in 1978. On Page 43, it shows total assets increasing from $3,122,000,000.00 in 1969 to $6,935,000,000.00 in 1978. Page 35 shows earnings employed in the business as of the beginning of 1978 as $2,406,000,000.00 as compared to the end of 1978 of $2,931,000,000.00. Page 43 shows stockholders equity

increasing from $1,677,000,000.00 in 1969 to $6,935,000,000.00 in 1978. (Barnett Deposition; above pages of annual report attached to Pre-Trial Order.)

16) Phillips had received the increased rates merely by signing an agreement or corporate undertaking with the Federal Power Commission to refund any amounts with interest in accordance with FPC regulations. (Plaintiffs' trial evidence.) However, Phillips required of its Royalty owners a bank letter of credit or a corporate surety bond. (Roberts Deposition, Pages 75-80 and Page 115; Exhibit 25; and Plaintiffs' trial evidence.)

17) The applicable rates of interest which Phillips would have been required to pay pursuant to the corporate undertaking are established by 18 CFR, Section 154.67, as follows:

Until October 10, 1974		7.00%
October 10, 1974 to September 30, 1979		9.00
Oct. to Dec. '79	(June, Jul., Aug. average)	11.70
Jan. to Mar. '80	(Dec., Jan., Feb.)	14.28
Apr. to June '80	(Mar., Apr., May)	15.39
Jul. to Sept. '80	(June, July, Aug.)	18.22
Oct. to Dec. '80	(Sept., Oct., Nov.)	11.74
Jan. to Mar. 81	(Dec., Jan., Feb.)	14.03
Apr. to June '81	(Mar., Apr., May)	19.98
July to Sept. '81	(June, July, Aug.)	18.27
Oct. to Dec. '81	(Sept., Oct., Nov.)	20.31
Jan. to Mar. '82	(Dec., Jan., Feb.)	18.46

(Further rates as determined by Federal Reserve Bulletins.)

18) Gas royalty agreements, casinghead gas purchase contracts, renewal contracts and division orders which purport in any way to relieve Phillips from the payment of interest on suspense royalties are not valid as far as royalty owners are concerned or binding on this court. The purported contracts between gas producers and Phillips should not be binding on the outside royalty owners

where Phillips had use of the outside royalty owners' money and paid them no interest. (*Shutts*, supra, Syl. 21 and 22.) The outside royalty owners and the inside royalty owners are in the same class and Phillips owed them the same duties.

As to the "without interest" casinghead gas contracts, here again Phillips attempted by contract with the gas purchaser to eliminate its liability for interest. Such contracts are not binding on the outside gas royalty owners for the reasons above stated.

19) The dates and the amounts of suspense royalties collected by Phillips and the dates and amounts of payments of this money by Phillips are contained in the records of defendant and are readily ascertainable through the use of their computer.

20) Gas producers owe interest to their royalty owners on FPC suspense royalties held and used by the producer (Phillips in this case) as set forth in *Shutts v. Phillips Petroleum Company*, 222 Kan. 527, 567 P.2d 1292, Cert. denied 98 S. Ct. 1246. Interest shall be paid from the time said royalties were received by Phillips until paid to the royalty owners, at the applicable rates set forth above. (See *Shutts*, supra, P. 564.)

21) The position of Phillips that no interest is owed but only principal because the payments made must be first applied to interest under the U.S. Rule announced in *Shutts*, supra, and therefore only principal is left owing, is without merit. The rules set forth in *Shutts*, supra, allow a recovery under equitable considerations. Whether the recovery is for interest or principal is merely a strained construction of words. Plaintiffs are entitled to money for Phillips' use of their money, according to 18 CFR Section 154.67. The pleadings on file herein are conformed, if necessary, to meet the evidence presented.

22) As to all persons furnishing indemnity agreements to Phillips, defendant had use of suspended roy-

alties from the date of receipt by Phillips until date of execution of the agreement and as to the specific property covered by the agreement.

23) As to royalty owners who signed to accept payment without interest, they are estopped from claiming interest.

CONCLUSIONS OF LAW

1) This case is a successor to *Shutts v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292.

2) It is without question in Kansas that gas producers owe interest to their royalty owners on FPC suspense royalties held and used by the producers. (*Shutts v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292, Cert. denied 98 S. Ct. 1246; *Gray v. Amoco Production Co.*, 1 Kan. App. 2d 338, 564 P.2d 579; 223 Kan. 441, 573 P.2d 1080; *Maddox v. Gulf Oil Corp.*, 222 Kan. 733, 567 P.2d 1326, Cert. denied 98 S. Ct. 1242; *Sterling v. Marathon Oil Co.*, 223 Kan. 686, 576 P.2d 634; *Sterling v. Superior Oil Co.*, 222 Kan. 737, 567 P.2d 1325, Cert. denied 98 S. Ct. 1246; *Nix v. Northern Natural Gas Producing Co.*, 222 Kan. 739, 567 P.2d 1332, Cert. denied 98 S. Ct. 1246; and *Helmley v. Ashland Oil Co., Inc.*, 1 Kan. App. 2d 532, 571 P.2d 345.

3) The defendant is liable for interest on all royalty and overriding royalty retained by it during the period that royalty was collected and suspended by Phillips pending approval by the FPC (FERC) and the courts of certain rate increases under Opinion Nos. 699, 749 and 770, with the exceptions noted in Findings 22 and 23 above.

4) The applicable rate of interest for which Phillips is liable is seven percent (7%) per annum until October 10, 1974, nine percent (9%) per annum thereafter until September 30, 1979, and thereafter at the average prime rate, compounded quarterly, as provided by 18 CFR 154.67.

5) The period of time for which interest is due shall be calculated from the date or dates said suspense royalty was received by Phillips to the date or dates said suspense royalty was paid, with the exceptions noted in Findings 22 and 23 above. Following the respective payouts the remaining interest (principal according to the U.S. Rule) shall bear interest according to 18 CFR 154.67.

6) Phillips has or can compile through its data base and computer program all of the necessary information with which to calculate the amount of interest due and owing.

7) Division orders, unitization agreements, gas royalty agreements, casinghead gas contracts, and any other type agreements which contain a "no interest clause", whether as to "inside" or "outside" royalty owner are attempted unilateral agreements. They do not in any way alleviate the duty of Phillips to pay interest as above set forth. (*Shutts*, supra and *Maddox*, supra.) In this case Phillips distinguishes between inside and outside royalty owners, with the inside royalty owners being those lessors with whom Phillips has a direct contract in the usual lease form. The outside royalty owners represent those royalty owners in which Phillips buys gas production from a producer and has the obligation to make royalty payments to those owners as designated by the producers. Also, Phillips uses, in some instances, substantial portions of the gas produced in its own operations, and therefore, does not sell to a pipeline company.

Phillips asserts that as a result of this, the pay adjustments do not necessarily belong to somebody else, but either belong to Phillips as a consumer, in the case of disapproval of the anticipated rate raises, or if approved, to the royalty owners.

The difficultiy with Phillips' position is that they assume, with their contractual or lessee obligations, that

by using the gas themselves, they can avoid the obligation imposed under the original Shutts case.

The court finds no basis to distinguish their obligations when they are their own consumer as a lessee, than when they are, as lessees in good faith, marketing the gas to pipelines or other consumers.

8) All findings and orders set forth in the journal entry certifying the class are incorporated herein.

9) Excluded from this judgment are those parties who have filed herein their exclusion and those parties who did not receive notice.

10) Interest statutes in other states are not applicable here. (*Shutts*, supra, Page 563-566.)

11) Interest following date of judgment will be at the average prime rate compounded quarterly as provided by 18 CFR 154.67.

12) The court hereby directs the entry of a final judgment upon the issues of liability as determined herein and finds that there is no just reason for delay, in accordance with K.S.A. 60-254(b).

13) The issue of attorney fees is reserved pending the accounting of money due and a further hearing on the same.

/s/ Keaton G. Duckworth
KEATON G. DUCKWORTH
District Judge

EXCERPT FROM REGULATIONS OF THE FEDERAL POWER COMMISSION

§ 154.102 Suspended changes in rate schedules; motions to make effective at end of period of suspension; procedure.

(a) *Effect of suspended changes in rate schedules.* If a rate suspension proceeding initiated under section 4(e) of the Natural Gas Act has not been concluded and an order issued by the Commission at the expiration of the suspension period, the proposed change of rate, charge, classification, or service shall go into effect upon motion of the independent producer proposing the change so long as the independent producer complies with all requirements of this section. The proposed rate, charge, classification, or service shall become effective as of the date of receipt of such motion by the Commission or the expiration of the suspension period, whichever is later. Three copies of the motion shall be filed with the Commission. The Secretary, upon receipt of such a motion, shall, if the motion is legally adequate for the purpose, notify the movant that the proposed rate change shall be effective as provided in this section: *Provided*, That the Secretary shall refer to the Commission any motion requesting that a change in rate, charge, classification, or service be made effective, if in his judgment the motion should receive the specific attention of the Commission.

(b) *Undertaking to comply.* (1) There shall be filed by the independent producer a surety bond, or other undertaking, to be approved by the Secretary to comply with the provisions of paragraphs (c) and (d) of this section. Three copies of the undertaking shall be filed with the Commission. The bond or undertaking may be filed concurrently with the motion to make the increased rates effective. If with his/her motion the producer has not filed a satisfactory bond or undertaking such bond or undertaking must be filed within 30 days after the

issuance of the Secretary's notice provided for in paragraph (a) of this section. Unless notified to the contrary by the Secretary of the Commission within 30 days from the date of filing, such bond or undertaking shall be deemed to be satisfactory and to have been accepted for filing.

(2) In compliance with subparagraph (1) of this paragraph, an independent producer may file a general undertaking affording blanket refund coverage of any present and future rate increases suspended under section 4(e) of the Natural Gas Act and collected subject to refund thereunder. Upon acceptance of such general undertaking, the producer need not file further refund assurance when filing a motion to make increased rates effective unless specifically required to do so by order of the Commission.

(c) *Record keeping.* Any independent producer whose proposed increased rates or charges were suspended and have gone into effect pending final order of the Commission pursuant to section 4(e) of the Natural Gas Act shall:

(1) Keep accurate accounts of all amounts received by reason of the increased rates or charges which became effective after the suspension period, for each billing period, specifying by whom and in whose behalf such amounts are paid;

(2) Record for each purchaser:

(i) The monthly billing determinants of natural gas sold and delivered to each purchaser under the suspended agreements and tariffs;

(ii) The revenues which would result from such sales if they were computed under the rates in effect immediately prior to the date the proposed increased rates or charges became effective;

(iii) The revenues resulting from such sales as computed under the proposed increased rates or charges that became effective after the suspension period; and

(iv) The difference between the revenues computed in clauses (ii) and (iii) of this subparagraph.

(d) *Refunds.* (1) Any independent producer that collects rates and charges pursuant to this section shall refund at such times, in such amounts to the persons entitled thereto and in such manner as may be required by final order of the Commission the portion of any increased rates or charges found by the Commission in that proceeding not to be justified, together with interest thereon as required in subparagraph (2) of this paragraph.

(2) Interest shall be computed from the date of collection until refunds are made as follows:

(i) At a rate of seven percent simple interest per annum on all excessive rates or charges held prior to October 10, 1974;

(ii) At a rate of nine percent simple interest per annum on all excessive rates or charges held between October 10, 1974, and September 30, 1989; and

(iii) (A) At an average prime rate for each calendar quarter on all excessive rates or charges held on or after October 1, 1979. The applicable average prime rate for each calendar quarter shall be the arithmetic mean, to the nearest one-hundredth of one percent, of the prime rate values published in the *Federal Reserve Bulletin* for the fourth, third, and second months preceding the first month of the calendar quarter.

(B) The interest required to be paid under clause (iii) (A) shall be compounded quarterly.

(3) Any independent producer that is required to refund amounts collected pursuant to this section shall bear all costs of any such refunding.

(4) Until the independent producer makes the refunds as may be required by order of the Commission, the undertaking required by this section shall remain in full force and effect.

(Sec. 5, 52 Stat. 823, 15 U.S.C. 717d) [Order 215, 24 F.R. 8374, Oct. 15, 1959, as amended by Order 230, 25 F.R. 12653, Dec. 10, 1960; Order 278, 29 F.R. 3700, Mar. 25, 1964; Order 326, 31 F.R. 11935, Sept. 10, 1966; Order 377, 33 F.R. 18624, Dec. 17, 1968; Order 405, 35 F.R. 8633, June 4, 1970; Order 405-B, 36 377, 33 F.R. 18624, Dec. 17, 1968; Order 405-B, 36 F.R. 22058, Nov. 19, 1971; Order 513, 39 F.R. 37359, Oct. 21, 1974; Order 513-A, 41 F.R. 30325, July 23, 1976; 44 F.R. 53493, Sept. 14, 1979.] (Subsequent amendments not shown)

BEFORE
FEDERAL POWER COMMISSION

Docket No. R-354

PHILLIPS PETROLEUM COMPANY

GENERAL AGREEMENT AND UNDERTAKING OF PHILLIPS PETROLEUM COMPANY TO COMPLY WITH REFUNDING AND REPORTING PROVISIONS OF SECTION 154.102 OF THE COMMISSION'S REGULATIONS UNDER THE NATURAL GAS ACT

Phillips Petroleum Company (Phillips) hereby tenders for filing, pursuant to Section 154.102(b)(2) of the Commission's Regulations under the Natural Gas Act, as amended by Order No. 377 issued December 10, 1968, in Docket No. R-354, its general agreement and undertaking to comply with the refunding and reporting provisions of said Section 154.102 insofar as they are applicable to any increases in Phillips' rates filed after the date hereof and suspended under Section 4(e) of the Natural Gas Act and which are thereafter collected subject to refund. Phillips has caused this general agreement and undertaking to be executed and sealed in its name by its officers, thereupon duly authorized in accordance with the terms of the resolution of its Executive Committee, acting for and on behalf of the board of directors, a certified copy of which is appended hereto.

Dated Feb. 24, 1969.

PHILLIPS PETROLEUM COMPANY

By Dan L. Mayer, Manager
Natural Gas and
Gasoline Department

STATE OF OKLAHOMA
COUNTY OF WASHINGTON

KNOW ALL MEN BY THESE PRESENTS:

That, I, the undersigned Secretary of the Executive Committee of Phillips Petroleum Company, a corporation duly authorized and existing under the laws of the State of Delaware, do hereby certify that the following is a true and correct copy of a resolution adopted in a meeting of the Executive Committee of said company held on the 22nd day of May, 1964, at its principal office in Bartlesville, Washington County, Oklahoma:

> "RESOLVED: By the Executive Committee of Phillips Petroleum Company that Mr. W. L. Culbertson, Vice-President, or Mr. Dan L. Mayer, Manager of the Natural Gas and Gasoline Department, are authorized to execute on behalf of Phillips Petroleum Company for delivery to the Federal Power Commission written agreements wherein Phillips Petroleum Company agrees and undertakes to comply with the refunding and reporting provisions of Section 154.102 of the Commission's Regulations under the Natural Gas Act insofar as they are applicable to proceedings involving Phillips Petroleum Company."

The above quoted resolution of the Executive Committee of said company is properly recorded as a part of the minutes of said meeting in the Executive Committee Minutes for said date, and I hereby further certify that the foregoing resolution has not been altered, amended, rescinded or appealed and is now in full force and effect.

/s/ W. G. Angel
W. G. ANGEL
Secretary, Executive Committee

STATE OF OKLAHOMA)
) ss.
COUNTY OF WASHINGTON)

On this Feb. 24, 1969, before me appeared Dan L. Mayer to me personally known, who being by me duly sworn did say that he is Manager of the Natural Gas and Gasoline Department of Phillips Petroleum Company, and that the foregoing instrument was signed on behalf of the corporation by authority of its Executive Committee and that Dan L. Mayer assures the instrument to be the free act and deed of the corporation.

/s/ Edward K. Bolt
EDWARD K. BOLT
Notary Public in and for
County of Washington
State of Oklahoma

My Commission Expires:

August 23, 1969

[SEAL]

COUNTY OF WASHINGTON)
) ss.
STATE OF OKLAHOMA)

On this 1st day of May, 1968, before me appeared W. G. Angel to me personally known, who being by me duly sworn did say that he is Secretary of the Executive Committee of Phillips Petroleum Company, an officer of said corporation, and that as such he is familiar with the records of the minutes of said committee and that the matters and facts set forth in the foregoing certificate are true and correct to the best of his knowledge, information and belief.

/s/ Edward K. Bolt
EDWARD K. BOLT
Notary Public in and for
County of Washington
State of Oklahoma

My Commission Expires:

August 23, 1969

[SEAL]

CERTIFICATE

I, the undersigned, *Harvey W. Thompson*, the duly elected, qualified, and Assistant Secretary of Phillips Petroleum Company, a Delaware corporation, with an operating office at Bartlesville, Oklahoma, do hereby certify that Section 2 of Article IV of the By-Laws of said company provides that:

> "The Executive Committee shall possess and may exercise and perform each and all of the powers and duties of the Board of Directors when the Board of Directors shall not be in session (including the power to cause the seal of the company to be affixed to all papers that may require it), except as said powers and duties shall be limited by the Board."

I further certify that the powers and duties of the Executive Committee, as provided in Section 2 of Article IV of the By-Laws of said company, have not been limited by the Board of Directors.

I further certify that on May 22, 1964, the Board of Directors of the said company was not in session.

I further certify that the attached and foregoing is a full, true and correct copy of a resolution adopted by said Executive Committee at a meeting duly held in Bartlesville, Oklahoma, May 22, 1964.

I further certify that the attached and foregoing resolution of the Executive Committee of Phillips Petroleum Company is in accordance with the Articles of Incorporation and the By-Laws of said company.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said company, at the City of

Bartlesville, Washington County, State of Oklahoma, this 26th day of June, A. D., 1968.

[SEAL]

/s/ Harvey W. Thompson
HARVEY W. THOMPSON
Assistant Secretary
Phillips Petroleum Company

RULE 28.1 LIST

PHILLIPS PETROLEUM COMPANY'S DIRECT AND INDIRECT SUBSIDIARIES AND AFFILIATES OWNED LESS THAN 100%*

Aleska Pipeline Service Company

Artic LNG Transportation Company

Canada Western Cordage Company, Limited

Canyon Reef Carriers, Inc.

Chisholm Pipeline Company

Cochin Refineries Limited

Colonial Pipeline Company

Dixie Pipeline Company

East Texas Salt Water Disposal Company

Explorer Pipeline Company

Great Yarmouth Port Labour Company Limited

Heat Transfer Research, Inc.

Iranian Marine International Oil Company—IMINOCO

Kenai LNG Corporation

Long Beach Oil Development Company

Multinational Gas and Petrochemical Services Limited

Norland GMBH fur Grundbesitz and Industrieanlagen

Norpipe A.S

Norpipe Petroleum UK Limited

Norsea Gas A/S

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* Does not include companies required to issue one or more shares to directors or officers.

Norsea Gas GMBH

Norsea Pipeline Limited

Oil Insurance Limited (New)

Papago Chemicals, Inc.

Phillips Carbon Black Company (Proprietary) Limited

Phillips Carbon Black Italiana S.P.A.

Phillips Carbon Black Limited

Phillips Extruded Products-Les Produits Extrudes Phillips

Phillips Petroleum Chemicals

Phillips Petroleum International Andina, S.A.

Phillips Petroleum International S.P.A.

Phillips Petroleum Singapore Chemicals (Private) Limited

Phillips Petroleum Tanker Management, Inc.

Phillips Petroleum Toray Inc.

Phillips-Imperial Petroleum Limited

Polar LNG Shipping Corporation

Renolit-Haus GMBH

Solar Gas, Inc.

SPODCO Limited

SPODCO-USA, Inc.

The Salk Institute Biotechnology/Industrial Associates, Inc.

Venezoil, C.A.

Walton Insurance Limited

Western Desert Operating Petroleum Company (WEPCO)

White River Shale Oil Corporation

(3) 87-348

No. 87-384

Supreme Court, U.S.
FILED
SEP 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

PHILLIPS PETROLEUM COMPANY,
Petitioner,

vs.

IRL SHUTTS and ROBERT ANDERSON and BETTY ANDERSON, individually and as representatives of all royalty owners to whom Phillips Petroleum Company made payment of suspended proceeds of royalties pursuant to Federal Power Commission Opinion Nos. 699, 749 and 770,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI AND ANSWER TO PETITION FOR WRIT OF MANDAMUS

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32 pp

QUESTIONS PRESENTED

1. Did the Kansas courts thoroughly review the statutes and case law of other interested states pertaining to interest on FERC suspended royalties and find they would have decided this case just as did Kansas?

2. Did the specific application by Kansas of FERC interest rate, which is essentially the bank prime rate, violate any of Phillips' constitutional rights?

3. Is there now or has there ever been any "federal common law" issue in this case?

TABLE OF CONTENTS

QUESTIONS PRESENTED I
TABLE OF AUTHORITIES III
NATURE OF THE CASE 2
STATEMENT OF THE CASE 2
SUMMARY OF ARGUMENT 6
ARGUMENT 7

I. Phillips' Petitions Not Justified 7
II. Federal Common Law Not an Issue 10
III. Forum Shopping Not an Issue 11
IV. Judge Duckworth's Opinion 11
V. Kansas Supreme Court Decision 14
VI. National Gas Pricing 17
VII. No Constitutional Principles Violated 18

CONCLUSIONS 21

TABLE OF AUTHORITIES

Cases:

Allstate Ins. Co. v. Hague, 449 U.S. 302 18
Boutte v. Chevron Oil Company, 316 F. Supp. 524 .... 3, 9
Brooklyn Union Gas Co. v. Transcontinental Gas P. L. Corp., 201 F. Supp. 679 (1960) 8
Continental Oil Co. v. FPC, 378 F.2d 510 8
Gray v. Amoco Production Co., 1 Kan. App.2d 388, 564 P.2d 579 (1977), modified, 223 Kan. 441 (1978) 9
Helmley v. Ashland Oil, Inc., 1 Kan. App.2d 532, 571 P.2d 345 (1977) 9
In Re Permian Basin Area Rate Cases, 88 S. Ct. 1344 (1968) 8
Maddox v. Gulf Oil Corporation, 222 Kan. 733, 567 P.2d 1326 (1977), cert. denied, 434 U.S. 1065 (1978) 9
Matzen v. Cities Service Oil Co., 233 Kan. 846, 667 P.2d 337 11
Mississippi River Fuel Corp. v. FPC, 281 F.2d 919 (1960) 8
Nix v. Northern Natural Gas Producing Co., 222 Kan. 739, 567 P.2d 1322 (1977), cert. denied, 434 U.S. 1067 (1978) 9
Phillips Petroleum Co. v Adams, 513 F.2d 355 (5th Cir. 1975), cert. denied, 423 U.S. 930 (1979) 12, 20-21
Phillips Petroleum Company v. Stahl Petroleum Company, 569 S.W.2d 480 (Texas, 1978) 3, 8, 12, 19, 21
Phillips Petroleum Co. v. Hazelwood, 409 F. Supp. 1193 21
Shutts v. Phillips Petroleum Company, 235 Kan. 195, 679 P.2d 1159 (1984) 2, 3, 14, 15, 20
Shutts, Executor v. Phillips Petroleum Company, 222 Kan. 527, 567 P.2d 1292 (1977), cert. denied, 434 U.S. 1068 (1978) 2, 3, 6, 9, 10, 11, 14, 15, 17

Sid Richardson Carbon & Gas Co. v. Phillips Pet. Co., 456 F.2d 203 (1972) 9, 13
Skelly Oil Co. v. FPC, 401 F.2d 726 (1968) 8
Sterling v. Superior Oil Co., 222 Kan. 737, 567 P.2d 1325 (1977), cert. denied, 434 U.S. 1067 (1978) 9
Texaco, Inc. v. FPC, 290 F.2d 149 (1961) 8
United Gas Improvement Co. v. Callery Properties, 382 U.S. 223, 15 L.Ed. 284, 86 S. Ct. 360, Syl. 9 8
United States v. L. A. Tucker Truck Lines, 344 U.S. 33, 97 L.Ed. 54, 73 S. Ct. 67 19
United States v. Mitchell, 271 U.S. 9, 70 L.Ed. 799, 46 S. Ct. 418 20
United States v. More, (U.S.) 3 Cranch 159, 2 L.Ed. 397 19
Webster v. Fall, 266 U.S. 507, 69 L.Ed. 411, 45 S. Ct. 148 20
West Edmond Hunton Line Unit v. Young, 325 P.2d 1047 12
Wortman v. Sun Oil Co., 236 Kan. 266, 690 P.2d 385 (1984), vacated, ... U.S. ....., 88 L.Ed.2d 33 (1985) 9, 11

Other Authorities:

18 C.F.R. 154.67 6
18 C.F.R. 154.102 17
18 C.F.R. 154.162 10
20 Am Jur 2d, *Courts*, Section 190 19
Corpus Juris Secundum, *Courts*, Section 186 19

No. 87-384

In the Supreme Court of the United States

OCTOBER TERM, 1987

PHILLIPS PETROLEUM COMPANY,
Petitioner,

vs.

IRL SHUTTS and ROBERT ANDERSON and BETTY ANDERSON, individually and as representatives of all royalty owners to whom Phillips Petroleum Company made payment of suspended proceeds of royalties pursuant to Federal Power Commission Opinion Nos. 699, 749 and 770,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI AND ANSWER TO PETITION FOR WRIT OF MANDAMUS

Petitioner will be referred to as "Phillips." Plaintiff class consists of all of to whom Phillips pays gas royalties, excepting those who have "opted out" and a few who signed indemnity agreements and were paid currently. They will be referred to as "gas royalty owners," "landowners," "royalty owners" or "respondents."

The opinions below are as set forth in Phillips' Appendix to Petition.

NATURE OF THE CASE

This is an action in equity, a class consisting of Phillips' gas royalty owners against Phillips to collect interest or damages for the use by Phillips of the royalty owners' money, ordinarily paid out to the royalty owners monthly. Phillips instead notified its royalty owners that it was suspending certain increased royalties pending approval by the courts of gas rate increases allowed by FERC. Phillips did not suspend the increased royalties by placing them in a suspense account which would draw interest, but, instead, placed them in their general cash account, just as other income from royalty owners' leases, and used them to make a profit for Phillips and its shareholders.

This is a reversal and remand by the U. S. Supreme Court to re-examine the interest laws of other states where Phillips has the oil and gas leases giving rise to the royalties "suspended" and used by Phillips. The exact same set of facts, except for numbers and territory involved, was before the Kansas Supreme Court twice before. (*Shutts I* and *Shutts II.*)[1]

STATEMENT OF THE CASE

On remand from the U. S. Supreme Court, the Kansas Supreme Court first sent the case back to the trial court for re-examination in the light of the U. S. Supreme Court opinion. The Trial Court re-examined interest laws of

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1. *Shutts, Executor v. Phillips Petroleum Company,* 222 Kan. 527, 567 P.2d 1292 (1977), cert. denied, 434 U.S. 1068 (1978); and *Shutts v. Phillips Petroleum Company,* 235 Kan. 195, 679 P.2d 1159 (1984).

other states and came to the same conclusion as before regarding interest allowable in those states and the interest rate.

The Kansas Supreme Court affirmed the Trial Court again, saying, "this is the third time this case has been before us." True. The first case was *Shutts, Executor v. Phillips,* involving the Hugoton-Anadarko area, and 6,400 of Phillips' royalty owners of whom only 264 resided in Kansas. In *Shutts, Executor,* FPC Opinion 586, an area consisting of all of the State of Kansas and parts of the States of Texas and Oklahoma were involved. This was one of seven pricing areas of the FPC at the time. Later, with Opinion 699, involved in this case, the FERC (formerly FPC) abandoned area-wide pricing and began nation-wide pricing because natural gas was bought, distributed and sold nation-wide, not just area-wide. Pricing being nation-wide, the class affected by Phillips' actions became nation-wide rather than area-wide.

Kansas in a number of cases and all other states that have examined the question of equity in requiring gas producers to pay interest on their royalty owners' money held and used rather than being paid out, have required the gas producers to pay interest to their royalty owners.[2]

Phillips raises no defense to the general and universal proposition in equity that where one makes use of another's money to make a profit for himself, he must pay for its use.

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2. *Shutts, Executor v. Phillips Petroleum Company,* 222 Kan. 527; *Shutts v. Phillips Petroleum Company,* 235 Kan. 195; *Phillips Petroleum Company v. Stahl Petroleum Company,* 569 S.W.2d 480; *Boutte v. Chevron Oil Company,* 316 F. Supp. 524.

Rather, Phillips fabricates defenses based on technicalities of laws of other states and alleged constitutional infirmities of the actions of the Kansas courts, as will be discussed more later in this brief.

Plaintiff class consists of the landowners, those who originally owned the oil, gas and other minerals in and under the land, and also certain assignees of interest in the oil, gas and minerals. They have leased either directly to Phillips Petroleum Company or to oil and gas brokers who have assigned to other producers or to Phillips, and Phillips, under the terms of the oil and gas leases, customarily pays out 1/8th of the proceeds of sale of gas produced to those royalty owners monthly. Phillips and in some cases other gas producers receive the 7/8ths of the proceeds of production.

In order to obtain a price increase for gas sold by Phillips to gas purchasers, certain rate schedules had to be filed with the FERC, setting forth the increase, and in Opinions 699, 749 and 770, FERC did approve certain rate increases. Phillips collected the rate increases. Phillips now calls the 1/8th of the increases as to royalty owners "additional royalties." This they are, but heretofore they have been called "suspense" royalties by Phillips. This is a misnomer because the royalty money itself never was suspended. It was put in Phillips' cash account and used by Phillips to make a profit.

Phillips exaggerates: it convinced this Court that the difference between the Texas 6% statutory rate and the FERC rate of 9% (up until October 1, 1979) would amount to "millions of dollars." (Appendix, U. S. Supreme Court Opinion, Page 80a.) Attached is copy of letter from T. L. Cubbage, head of Phillips Legal Depart-

ment, pertaining to total interest due at FERC rates until the end of 1987. Total interest due under all rate schedules when this case was filed in August, 1979, was only about $1 million. The increase to $2.4 million is accounted for by Phillips' continuing to contest the payment of interest, even after it had paid interest under almost identical facts and circumstances in *Shutts I*. Payment of $1.00 interest to its royalty owners in 1979 would have prevented the payment now of approximately $2.50. Payment of $300,000.00 to royalty owners at the time this suit was filed - not "millions of dollars" - would have satisfied the difference. The Texas statutory rate is discussed later in this argument.

The following are the essential facts as quoted from the Kansas Supreme Court Opinion, Appendix to Petition, Page 116a.

> "This is a class action suit brought against Phillips . . . by Irl Shutts, Robert Anderson and Betty Anderson, individually and on behalf of 28,100 royalty owners, including those who are not residents of Kansas, for recovery of interest on 'suspense royalties' on gas produced from leases in 11 states. These royalties were withheld by Phillips at various times from July, 1974 to February, 1978, under three Federal Power Commission (FERC) Opinions pertaining to gas rates in *nation-wide gas rate proceedings* (emphasis supplied), and later paid by Phillips to the royalty owners without interest. The Trial Court determined (1) the class consisted of all royalty owners and overriding royalty owners who received suspense royalties from Phillips, whether or not they were residents of Kansas (2) Phillips was liable for for interest on all royalties and overriding royalties

retained by it under the FPC Opinions, and (3) the applicable rate of interest owed on the suspense royalty payments (seven percent (7%) per annum until October 10, 1974, nine percent (9%) per annum thereafter until September 30, 1979, and thereafter at the average prime rate, compounded quarterly, as provided by 18 C.F.R. 154.67)."

SUMMARY OF ARGUMENT

1. Phillips' Petitions are not justified and are not legally responsible.

2. Phillips raises for the first time an issue it calls "federal common law." This issue has not been raised before. It should not be raised now. The decisions of the Kansas Trial Court and of the Kansas Supreme Court have nothing to do with federal common law. They apply the same interest rate, the bank prime rate, the FERC rate, to this same money refunded to its royalty owners that Phillips would have had to pay to its gas purchasers if the money had been refunded to them. It is an equitable rate. It is a proper rate. It is not an attempt to extend federal regulation, but simply using a rate that Phillips would have had to pay if it had borrowed the money rather than using the royalty owners' money.

3. Forum shopping is not an issue. There has been no forum shopping in Kansas in the 10 years since the *Shutts I* Kansas decision.

4. The decision of the trial judge, Honorable Keaton G. Duckworth is fair and impartial. He reviewed cases and statutes in other states cited by Phillips. He came to the same conclusion as before, Phillips would have been

liable had all of the facts and circumstances of this case been presented to the Supreme Courts of the other states involved, and at the bank prime rate, the FERC rate.

5. The Kansas Supreme Court decision was fair and impartial. It indicated a thorough review of cases and statutes of other states pertaining to interest as a matter of equity. It found that the antique 6% statutory interest laws were not applicable here, but that Phillips should pay interest the same as banks would have charged their good customers, the prime rate, the FERC rate.

6. National gas pricing is not an issue in this case.

7. The decisions of the Kansas Courts are not arbitrary or unfair as far as Phillips is concerned, are responsive to the opinion of this Court and violate no constitutional principles.

ARGUMENT

I. Phillips' Petitions Not Justified

Phillips' Petition for Mandamus and Certiorari is based on fabrication. Its accusations against the Kansas Supreme Court are in error, not responsible, and, at best, undignified:

1. "The Kansas courts' repeated reliance on . . . 'equitable considerations' . . . only reflect their own *parochial interest.*" (Phillips' Petition, Page 14.)

2. "The Kansas Supreme Court seems *pathologically determined* to maximize Phillips' liability . . ." (Petition, Page 14.)

3. "Its latest technique is simply to 'FERC'em'." (Petition, Page 14.)

The Kansas court has been well respected for many years and still stands high among the Supreme Courts of the various states. Its opinions are fair and impartial. In this case, it affirmed judgment for interest equitably due Phillips' own royalty owners for money used for the benefit of Phillips and its shareholders. The Supreme Court of Kansas does not deserve treatment such as the above at the hands of Phillips.

Phillips further demonstrates its bad faith in its argument by such allegations as:

> "The (Kansas) court's lack of good faith also can be seen by the bald fabrication of 'industry practice' to defeat the effect of a controlling Oklahoma statute." (Petition, Page 17.)

The term "industry practice" was taken from an Oklahoma case. The Kansas court did not make bald fabrications about the statute, but did cite Oklahoma cases to show the statute was not applicable in this case.

In Texas, *Phillips Petroleum Co. v. Stahl*, equity principles were applied but the statutory 6% rate rather than the 7% FPC rate at the time was applied. The most equitable interest rate obviously is not the statutory rate. The FERC rate has been held many times to be an equitable interest rate to prevent unjust enrichment.[3]

The Kansas court applied the FPC rate in seven similar class action cases in Kansas, and it was paid by the gas

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3. *United Gas Improvement Co. v. Callery Properties*, 382 U.S. 223, 15 L.Ed. 284, 86 S. Ct. 360, Syl. 9; *Texaco, Inc. v. Federal Power Commission*, 290 F.2d 149 (1961); *Mississippi River Fuel Corp. v. FPC*, 281 F.2d 919 (1960); *Brooklyn Union Gas Co. v. Transcontinental Gas P. L. Corp.*, 201 F. Supp. 679 (1960); *Continental Oil Co. v. FPC*, 378 F.2d 510; *In Re Permian Basin Area Rate Cases*, 88 S. Ct. 1344 (1968); *Skelly Oil Co. v. FPC*, 401 F.2d 726 (1968).

producers.[4] The Louisiana court in *Boutte v. Chevron,* 316 F. Supp. 524, said that FERC interest would be payable on the suspense royalties by Chevron when paid.

Wortman was a case quite similar to this one. Phillips did not opt out, but elected to stay in the case. (See letter from T. L. Cubbage, general counsel for Phillips, dated March 31, 1983, and hereto attached.)

In Texas, in *Sid Richardson Carbon & Gas Co. v. Phillips Pet. Co.,* 456 F.2d 203 (1972), Phillips was ordered to pay interest on suspense royalties at FERC rates. The court further said:

> "Phillips contends that the Texas law prohibits the award of interest on interest. . . We think Phillips misses the mark on this argument. . . The sum found due is technically interest. In substance, however, it is a part of the sum necessary under the holding of the District Court to place Richardson in parity with El Paso under the contract. Once that sum was determined, *it became a part of the whole.* Interest was due on so much of the whole as remained unpaid after January 31, 1969." (Emphasis supplied.)

Phillips' royalty owners had a legal and equitable right to expect Phillips to pay for the use of their money.

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4. *Nix v. Northern Natural Gas Producing Co.*, 222 Kan. 739, 567 P.2d 1322 (1977), cert. denied, 434 U.S. 1067 (1978); *Sterling v. Superior Oil Co.*, 222 Kan. 737, 567 P.2d 1325 (1977), cert. denied, 434 U.S. 1067 (1978); *Maddox v. Gulf Oil Corporation*, 222 Kan. 733, 567 P.2d 1326 (1977), cert. denied, 434 U.S. 1065 (1978); *Shutts, Executor v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292 (1977), cert. denied, 434 U.S. 1068 (1978); *Wortman v. Sun Oil Co.*, 236 Kan. 266, 690 P.2d 385 (1984), vacated, ... U.S. ....., 88 L.Ed.2d 33 (1985); *Helmley v. Ashland Oil, Inc.*, 1 Kan. App.2d 532, 571 P.2d 345 (1977); *Gray v. Amoco Production Co.*, 1 Kan. App.2d 388, 564 P.2d 579 (1977), modified, 223 Kan. 441 (1978).

Phillips should have expected to pay for the use of the money. Payments of suspense royalties without interest or mention of interest by Phillips was done deliberately, intentionally and knowingly in violation of its royalty owners' rights and interests. Certainly the rulings in this case were no surprise to Phillips and it would have been arbitrary and unfair to the royalty owners had they not been allowed interest as was done in *Shutts I* prior to the payouts in this case.

II. Federal Common Law Not an Issue

Phillips now contends that the Kansas courts treated the issues as though they were governed by a "wholly inapposite federal regulation, 18 C.F.R. Section 154.162." (Petition, Page 8.)

Not so. The Kansas court found that the royalty owners' share of the gas purchase money, 1/8th, was governed by federal regulation if it had to be refunded to the gas purchaser. The FERC interest rate had been determined by this and other cases to be an equitable rate, so what more equitable than to apply the same rate to refunds by Phillips to its own royalty owners?

Other state law did not differ from Kansas law. Kansas law and other state's law had a low statutory rate, when no other rate was applicable by contract or other law. The Kansas court found no federal common law surrounding the FERC interest regulation. It did find that the average bank prime rate, the best rates charged by banks to their good customers, which was the FERC rate, would be an equitable rate.

It is an admitted fact that royalty obligations of producers to their royalty owners are controlled not by

FERC but by the oil and gas leases and state law. Otherwise, this case would not be here. Phillips would have paid its royalty owners interest at FERC rates if the matter had been subject to FERC regulation. Phillips did in its request for indemnity from its royalty owners ask for refund of suspense royalties paid with interest at FERC rates, if refund were ordered.

III. Forum Shopping Not an Issue

Phillips is mistaken in its argument on "forum shopping". The seven cases referred to on Page 20 of its Petition all were filed by royalty owner clients of the firm of Chapin & Penny, who represent plaintiff class in this action, and of Hathaway & Kimball of Ulysses, Kansas, their co-counsel. All plaintiffs were Kansas residents. All cases were filed not after the *Shutts I* decision, but at about the same time as *Shutts I* was filed.

Wortman v. Sun Oil Co., 236 Kan. 266, 690 P.2d 385, was filed by a Kansas resident, a royalty owner client of Chapin & Penny at about the same time this case was filed. The helium case was filed in 1971. *Matzen v. Cities Service Oil Co.*, 233 Kan. 846, 667 P.2d 337, was a case concerned only with the market value of gas produced in Kansas.

There is no evidence that Kansas is a "magnet attracting class actions."

IV. Judge Duckworth's Opinion

The Kansas Supreme Court remanded this case to the trial judge for retrial in the light of the U. S. Supreme Court's reversal and mandate. The Honorable Keaton G. Duckworth lives in Elkhart, Kansas, in a part

of the Hugoton-Anadarko area adjoining Oklahoma and near Texas. He has had many years of experience on the bench and has heard many oil and gas cases. He is well respected throughout the State of Kansas for his decisions in oil and gas matters. He thoroughly re-examined cases and statutes in other states cited by Phillips and by plaintiff class. He said, among other things, the following:

> "Kansas . . . Texas . . . and Louisiana . . . are the only states to have been presented this issue directly, and all have reached the same conclusion as the Kansas Supreme Court." (Appendix, Memorandum Opinion, Page 55a.)

> "It may bear repeating that the issue to be decided in each state where the question arises is whether or not the defendant, as a producer, or with royalty obligations of a producer, may take advantage of the Federal Energy Regulatory Commission to withhold suspended royalties belonging to the royalty owners or to the buyers, and thus came the use of such money."

> "As the Texas Court noted in the *Stahl* case, quoting *Phillips Petroleum Co. v. Adams*, 513 F.2d 355, Phillips may say that the possession and utilization of funds to which it had no pretense of claim was reasonable, or even that the actions were necessary, but Phillips cannot be heard to say that is fair and equitable that it should enjoy such a financial advantage for so long, and pay not a cent for it." (Emphasis in original.) (Appendix, Page 55a.)

Judge Duckworth went on to review the case of *West Edmond Hunton Line Unit v. Young*, 325 P.2d 1047, which

allowed royalty owners prejudgment interest from date of sale of oil, and further said:

> "Thus, this Court concludes that if the issue were squarely presented to the Courts of Oklahoma, those courts would follow the rules announced in the Shutts cases."

Judge Duckworth cites the *Sid Richardson* case as further authority for the Texas Supreme Court to allow interest at FERC rates.

He further said:

> "The defendant, in the few instances in which indemnity agreements were obtained from royalty owners, and the increased rates were paid directly, required those royalty owners to agree to possible repayment at the FERC rate." (Appendix, Page 58a.)

Judge Duckworth quotes from interest laws of Texas, Oklahoma and Kansas, the statutes which call for 6% interest in the absence of any contract as to the rate of interest, and further says:

> "These are typical of those in all states involved in this action and all allow rates other than that specified by agreement of parties by contract or by other law. Thus, none are mandated to apply to the facts of this case."

He concluded:

> "I find no basis to conclude that any state court would be any less logical or fair than the Kansas Supreme Court has been in the *Shutts* case. And I find no legal basis for concluding that these states would produce results other than those reflected in the *Shutts* case." (Appendix, Page 59a.)

V. Kansas Supreme Court Decision

Phillips appealed from Judge Duckworth's decision and order. Briefs were filed by both parties. Oral argument was had before the entire court. The case was argued by the parties and decided in conference by the Kansas Supreme Court prior to the retirement of Chief Justice Schroeder. The decision of the Kansas Supreme Court was unanimous in favor of plaintiff class allowing interest on the money used by Phillips at an equitable rate which was found to be the FERC rate. Chief Justice Schroeder, who had written the opinions in *Shutts I* and *Shutts II* was assigned to write this opinion.

The Chief Justice writes opinions that are scholarly, thorough and decisive of the applicable law. He was District Judge of Harvey County, Kansas, an oil and gas county, before going to the Supreme Court a number of years ago.

The Supreme Court of Kansas is one of the better state courts, and they have dealt with oil and gas litigation many times.

Highlights from Chief Justice Schroeder's opinion this time are as follows:

> "This is the third time this class action case has come before the Supreme Court for review." (Appendix, Page 3a.)
>
> "(In *Shutts I*) . . . plaintiffs sought to recover interest on 'suspense royalties' attributable to gas produced from leases in the three state Hugoton-Anadarko area . . . during a nine year period from June, 1961 to October, 1970. . . The named plaintiff, a Kansas resident, was a representative of a class of 6,400 gas royalty owners, 218 of whom were Kansas residents.

> This court ruled it could exercise in personam jurisdiction over unnamed nonresident class plaintiffs where procedural due process was satisfied by notice, an opportunity to be heard, and adequate representation. Having found the class action was proper and binding on resident plaintiffs, this court also ruled that, *under the equitable principle of unjust enrichment,* Phillips was liable to the plaintiffs for interest on the suspended royalties in the amount set forth under Phillips' corporate undertaking with the Federal Power Commission (FPC), seven percent per annum, with an additional statutory post-judgment interest of eight percent per annum." (Emphasis supplied.)

The opinion goes on to show that *Shutts II* "was factually similar to *Shutts I.*" It further quoted from *Shutts II* as follows:

> "In *Shutts I* it was held the rate of interest set forth in the corporate undertaking established an appropriate measure of damages to compensate the plaintiffs for the unjust enrichment derived by Phillips from the use of the plaintiffs' money." (Appendix, Page 5a.)

The opinion then refers to the findings of his Court on jurisdiction over nonresident plaintiffs, the matter of whether or not there was a conflict in the laws of Kansas and the laws of other states involved and whether or not the conflicts alleged by Phillips actually existed. The opinion quotes from the U. S. Supreme Court opinion, 472 U.S. at 816-18 as follows:

> "These putative conflicts range from the direct to the tangential and may be addressed by the Supreme Court of Kansas on remand under the correct constitutional standard.
>
> . . .

"The conflicts on the applicable interest rates, alone - which we do not think can be labeled 'false conflicts' without a more thorough-going treatment than was awarded them by the Supreme Court of Kansas - certainly amounted to millions of dollars in liability." (Appendix, Pages 6a and 80a.)

"It is important to note the court stated the following:

"We make no effort to determine for ourselves which law must apply to the various transactions involved in this lawsuit, and we reaffirm our observation in *Allstate* that in many situations a state court may be free to apply one of several choices of law. But the constitutional limitations laid down in cases such as *Allstate* and *Home* . . . must be respected even in a nation-wide class action."

The decision then points out that Judge Duckworth's opinion "found no conflicts existed with the laws of Kansas on the two issues of liability and applicable interest rate" and the opinion goes on to say "we will review the laws of each of these states (Texas, Oklahoma, New Mexico, Wyoming, Louisiana and Kansas) as applicable to the two issues involved: (1) whether Phillips is liable to the royalty owners for interest on the suspense royalties and (2) if Phillips is liable, what is the applicable interest rate?

The opinion then reviews thoroughly and in detail the laws of each of the five principal states involved and the interest rate applicable.

The opinion concludes:

"Under equitable principles, the states would imply an agreement binding Phillips to pay the funds held

in suspense to the royalty owners when the FPC approved the respective rate increases sought by Phillips, together with interest at the rates and in accordance with the FPC regulations found in 18 C.F.R. Section 154.102 (1986) to the time of judgment herein. These funds held by Phillips as stakeholder originated in federal law and are thoroughly permeated with interest fixed by federal law in the FPC regulations as heretofore set forth in this opinion." (Appendix, Page 50a.)

Although having done considerable research into interest laws and rates of other states involved before,[5] the Kansas Courts now thoroughly have reviewed and considered the interest laws of Texas, Oklahoma, Louisiana, New Mexico and Wyoming, the cases and statutes cited by Phillips, and have come to the conclusions that there is no question about liability for interest as an equity matter and that the FERC rate is the proper rate in Kansas and other states.

The opinions should not call for wild speculations by Phillips about federal common law, nor should they call for Phillips to say in an almost vulgar manner that Kansas Courts are trying to "FERC'em".

VI. National Gas Pricing

Phillips complains about having to pay interest for the use of its royalty owners' money might have an adverse impact on interstate natural gas pricing. Records in this case show that Phillips' net profits for some of the years

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5. *Shutts v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292 (1977), cert. denied, 434 U.S. 1068 (1978), and cases there cited.

in question were in excess of $2 million per day. Paying out a little money for interest to its royalty owners should not affect price of natural gas Phillips charges to its gas purchasers and would affect net profits to Phillips and its shareholders only minimally.

VII. No Constitutional Principles Violated

The application of basic equitable principles of restitution to the facts of this case violated no constitutional proscription concerning choice of law. The measure of damages authorized by the Kansas Courts can hardly be said to be "arbitrary or fundamentally unfair" in any constitutional sense. (See *Allstate Ins. Co. v. Hague,* 449 U.S. 302.) It was based solely on Phillips' undertaking with the FPC and its indemnity offer to its own royalty owners. Despite Phillips' suggestion to the contrary, there is no real basis for this court to determine that this case, tried in the courts of one of the other states involved, would have led to a different result.

The Kansas Supreme Court has painstakingly reviewed the laws of the states involved and has determined that each of the states involved would require Phillips to pay interest on the money it withheld from royalty owners. The Kansas Court also reviewed the laws of the states involved and determined that each of the states would require that interest be paid at the same rates required of Phillips by FERC regulation. This rate is the same rate as *required by Phillips* in the indemnity agreements signed by some royalty owners.

The Kansas Court faithfully applied the laws of the several states involved to the unique facts of this case. There is no substantial federal question for decision by this Court.

Phillips contends that the Kansas Supreme Court ignored contrary Texas law as set out in *Phillips Petroleum Co. v. Stahl,* 569 S.W.2d 480 (Texas, 1978). In *Stahl* the plaintiff asked for and was awarded interest at the rate of 6% per annum. Phillips' liability for interest at a higher rate was not presented to the Texas Supreme Court, nor did the Texas Supreme Court rule on that point. The *Stahl* case is simply not authority for a *limit* of 6% interest. The issue of whether interest should be allowed at the 6% statutory rate *or* at FERC rates was not presented in the *Stahl* case and was not ruled on by the Texas Courts.

As to the statutory interest rate in *Stahl,* a decision is not a precedent unless the issue is argued and presented to the court. (Corpus Juris Secundum, *Courts,* Section 186.) In *United States v. L. A. Tucker Truck Lines,* 344 U.S. 33, 97 L.Ed. 54, 73 S. Ct. 67, it is said:

> "Even as to our own judicial power or jurisdiction, this court has followed the lead of Mr. Chief Justice Marshall who held that this Court is not bound by prior exercise of jurisdiction in a case where it was not questioned and it was passed sub silentio."

See also *United States v. More,* (U.S.) 3 Cranch 159, 2 L.Ed. 397. In 20 Am Jur 2d, *Courts,* Section 190, it is stated:

> "It is only a judicial decision on a point of law that is stare decisis, and it is not enough that the point was considered in the prior case; it must have been decided. Stated otherwise no opinion is an authority beyond the point actually decided. It follows that a case cannot be considered as a binding precedent on a legal point that was not argued in the case and not mentioned in the opinion."

See *United States v. Mitchell,* 271 U.S. 9, 70 L.Ed. 799, 46 S. Ct. 418, where it is said:

> "That question was not presented to the court for decision, and no such question was considered or decided. It is not to be thought that a question not raised by counsel or discussed in the opinion of the court has been decided merely because it existed in the record and might have been raised and considered."

See also, *Webster v. Fall,* 266 U.S. 507, 69 L.Ed. 411, 45 S. Ct. 148:

> "Counsel for appellant directs our attention to other cases, where this court proceeds to determine the merits notwithstanding the suits were brought against inferior or subordinate officials without joining the superior. We do not stop to inquire whether all or any of them can be differentiated from the case now under consideration, since in none of them was the point here at issue suggested or decided. The most that can be said is that the point was in the cases if anyone had seen fit to raise it. Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."

Chief Justice Schroeder in the last *Shutts* opinion for which Phillips is asking cert. and mandamus, pointed out that the issue of 6% versus 7% or higher has not been determined by the Texas Supreme Court. He said:

> "No Texas court ever mentioned the higher rates set by federal regulations to which Phillips had agreed to comply in its corporate undertaking. See *Phillips Petroleum Co. v. Adams,* 513 F.2d 355 (5th Cir. 1975),

cert. denied, 423 U.S. 930 (1979); *Phillips Petroleum Co. v. Hazelwood*, 409 F. Supp. 1193; *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480, 488 (Texas, 1978). This issue has not been determined by the Texas Supreme Court." (Appendix to Phillips' Brief, Kansas Supreme Court Opinion, 20a).

Surely, there can be no constitutional question involved in the Kansas Courts' applying the FERC rate, the equitable rate, rather than the statutory rate, when the issue of statutory rate versus equitable rate was not decided in the *Stahl* case.

CONCLUSIONS

The U. S. Supreme Court reversed and remanded and ordered the Kansas Courts thoroughly to consider the statutes and case law of the other states involved pertaining to interest. They have done so.

They find that the statutory rates, some of them enacted in the 1930's, would not be fair and equitable, but that the bank prime rate during the periods in question, the FERC rate, would be fair and equitable.

The opinions do not touch upon "federal common law" now alleged by Phillips to be an issue because it was not and is not an issue. The application by the Kansas Courts of FERC interest rate, the rate applied by Federal regulation to this same money if it were refunded to gas purchasers, is not creating federal common law.

Petition for Mandamus should be denied.

Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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(Received July 2, 1987)

PHILLIPS PETROLEUM COMPANY
Bartlesville, Oklahoma 74004 918 661-6600
Legal

16 June 1987
AIRBORNE

Mr. W. Luke Chapin
Chapin & Penny
124 East Kansas
Medicine Lodge, KS 67104

Re: Shutts II

Dear Luke:

Reference is again made to your pending Motion to Require Phillips to Account for Judgment. I am at last able to give your some definitive figures with regard to what the judgment against Phillips will be—as of 31 December 1987—if the United States Supreme Court does not grant Phillips' appeal in the fall of this year when the Justices return from vacation.

The computed liability, set out by state is as shown here and in the attached detail sheets:

• Arkansas	$ 2,252.20
• Kansas	1,012.42
• Louisiana	401,599.66
• Mississippi	167.53
• New Mexico	88,245.48
• Oklahoma	155,540.67
• Texas	1,472,936.19
• Utah	76.65
• West Virginia	3,904.87
• Wyoming	240,691.38
Total Interest	$2,366,427.05

This is a definitive number as to the interest liability, but it is not all that will be owed.

Total Interest	$2,366,427.05
Unpaid Royalty	130,578.81
Total Judgment	$2,497,005.86

In doing the roll-back audits necessary to generate the interest numbers, we found that some of additional royalty, the "principal," was never paid. Some $113,682.33 went into suspense accounts—dont's ask me why, and another $16,896.48 never got paid because of simple accounting errors. We figured the interest as though the unpaid royalty was paid and the total above includes interest on the unpaid royalty. We plan to pay the unpaid principal to the rightful owners when the interest is paid. As yet, I do not have the detail sheets to show me how the additional $130,578.81 is split out on a state by state basis, and I don't think that I can get it anytime soon. But, when the unpaid principal is added to the interest set out above, the grand total is $2,497,005.86.

This final total is less than shown in my letter dated on 16 June. The difference is accounted for by the fact that the earlier number did not have all of the indemnity money taken out of the equation. There was some indemnity agreement money paid out after the accruals bagan and we had to run the program first with that money still in before we could exclude for the periods after the various indemnity agreement were each signed. Anyway, pulling out the indemnity money dropped the total about $350,000.00 from the rought figure of about $2.85 million that I mentioned in my 16 June letter.

For the purpose of filing the supersedeas bond that you have indicated that you want, I suggest that we agree

on a bond in the amount of an even $2.5 million. This will cover the estimated total that would be due at the year's end.

I presume that the attached form of a Supercedeas Bond will be satisfactory to you.

Very truly yours,

/s/ Tom
T. L. Cubbage II
(918) 661-7026

TLC/tlc - RC

encl: (as)

cc: John L. Williford
Joseph Kennedy
Judge Keaton G. Duckworth
District Court
Seward County
Liberal, KS 67901

(Received April 4, 1983)

PHILLIPS PETROLEUM COMPANY
Bartlesville, Oklahoma 74004 918 661-6600
Legal

March 31, 1983

Mr. W. Luke Chapin
Chapin, Penny & Goering
P. O. Box 148
Medicine Lodge, KS 67104

Mr. Gerald Sawatzky
Foulston, Siefkin, Powers
& Eberhardt
700 Fourth Financial Center
Wichita, Kansas 67202

Mr. Ed Moore
Ginder & Moore
202 S. Grand
Cherokee, Oklahoma 73728

Mr. William C. Phelps
Sun Gas Company
Three North Park East
Dallas, Texas 75221

Re: Richard Wortman et al. v. Sun Oil Company, No. 79C40, District Court, Barber County, Kansas

Gentlemen:

Several Notices of Class Action Suit have been received by Phillips Petroleum Company, having been mailed to the company in care of P. O. Box 84616 in Dallas, Texas.

Please send all further communications to Phillips Petroleum Company in regard to the captioned case to the undersigned who is acting as counsel for the company in regard to this litigation.

This is *not* a request for exclusion.

Very truly yours,

/s/ T. L. Cubbage
T. L. Cubbage II
Office of General Counsel - Legal
Phillips Petroleum Company
1256 Adams Building
Bartlesville, Oklahoma 74004

TLC/ej

Encl. (as)

cc: Clerk of the District Court
Barber County, Kansas
Medicine Lodge, Kansas 67104

No. 87-348

Supreme Court, U.S.
FILED
OCT 6 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PHILLIPS PETROLEUM COMPANY,
Petitioner,

v.

IRL SHUTTS and ROBERT ANDERSON and BETTY ANDERSON, individually and as representatives of all producers and royalty owners to whom Phillips Petroleum Company made payment of suspended proceeds of royalties pursuant to Federal Power Commission Opinion Nos. 699, 699H, 749, 749C, 770 and 770A,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Kansas and Petition for Writ of Mandamus

REPLY OF PHILLIPS PETROLEUM COMPANY

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* Counsel of Record

Date: October 6, 1987

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TABLE OF CONTENTS

	Page
I. The Kansas Supreme Court Failed To Follow This Court's Mandate	1
II. The Kansas Court Created Federal Common Law	4
III. The Respondents' Uniform Equitable Doctrine Offends Constitutional Protections	5
CONCLUSION	9

TABLE OF AUTHORITIES

Cases: Page

Baker Marine Corp. v. Weatherby Engineering Co., 710 S.W.2d 690 (Tex. App. 1986) ---- 3
Close v. Fields, 13 Tex. 623 (1855) ---- 3
Missouri-Kansas-Texas Railroad Co. v. Fiberglass Insulators, 707 S.W.2d 943 (Tex. App. 1986) ---- 3
Phillips Petroleum Co. v. Stahl Petroleum Co., 569 S.W.2d 480 (Tex. 1978) ---- 3
Sid Richardson Carbon & Gas Co. v. Phillips Petroleum Co., 456 F.2d 203 (5th Cir. 1972) ---- 3
Shutts, Executor v. Phillips Petroleum Co., 222 Kan. 527, 567 P.2d 1292, *cert. denied*, 434 U.S. 1068 (1978) ---- 2
Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980) (plurality opinion) ---- 7
Watkins v. Junker, 90 Tex. 584, 40 S.W. 11 (1897) ---- 3
Wortman v. Sun Oil Co., 241 Kan. 226, 734 P.2d 1190 (1987) ---- 7

IN THE

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OCTOBER TERM, 1987

No. 87-348

PHILLIPS PETROLEUM COMPANY,
Petitioner,

v.

IRL SHUTTS and ROBERT ANDERSON and BETTY ANDERSON, individually and as representatives of all producers and royalty owners to whom Phillips Petroleum Company made payment of suspended proceeds of royalties pursuant to Federal Power Commission Opinion Nos. 699, 699H, 749, 749C, 770 and 770A,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Kansas and Petition for Writ of Mandamus

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REPLY OF PHILLIPS PETROLEUM COMPANY [1]

I. The Kansas Supreme Court Failed To Follow This Court's Mandate.

Respondents, like the court below, refuse to recognize that this Court has determined conclusively that Kansas law substantively conflicts with the law of the other states such as Texas. App. 84a-85a. Respondents, like the court below, fail to recognize this Court's holding

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[1] Phillips Petroleum Company's statement pursuant to Sup. Ct. R. 28.1 can be found at 175a of the Appendix to Petition for Writ of Certiorari to the Supreme Court of the State of Kansas and Petition for Writ of Mandamus.

that the Kansas court did not follow contrary Texas precedent in *Shutts, Executor v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292 (1977), *cert. denied*, 434 U.S. 1068 (1978). App. 85a, n. 8. Respondents, like the court below, have chosen to treat this Court's prior opinion as if it was silent on the existence of any conflict among the laws relating to interest of the interested states. Respondents, and the court below, believe themselves free to choose any construction of other states' laws unrestrained by the holdings of this Court. This defiant belief must not go unchallenged.

When this case was last before it this Court certainly did not attempt to address and determine each conflict between Kansas law and the laws of other interested states raised by Phillips Petroleum Company (Phillips). This Court determined that applying Kansas law to all transactions violated constitutional constraints; it reached that conclusion only after finding substantial conflicts between Kansas law and the laws of Texas, Oklahoma and Louisiana. App. 86a. This Court left to the Kansas Supreme Court the task of formulating a constitutionally permissible conflict of laws rule and applying the laws chosen pursuant to that rule.

In response to this task, the Kansas Supreme Court chose to examine and purportedly apply the laws of five other states, including states that this Court previously found to have laws that conflict with Kansas law. Having chosen the law of those states as appropriate law, the Kansas Supreme Court should have reached results consistent with this Court's holding as to what that law was. Instead of giving effect to the conflicts on the applicable interest rates and the other conflicts noted by this Court, the court below circumvented these conflicts by distorting the law of each of the interested states to make that law consistent with Kansas law.

Respondents do not attempt to justify the Kansas Supreme Court's most glaring avoidance of other states'

law—the application of FERC interest rates instead of the Texas statutory rate of interest—by citing any Texas authority that allows the FERC rates to be applied.[2] Instead, respondents, like the court below, in effect assert that the Kansas Supreme Court was free to create Texas law, notwithstanding the holding in *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480 (Tex. 1978), and subsequent cases applying that holding. The argument that *Stahl* has nothing to say about the rate to apply under an "equitable" allowance of interest is absolutely contrary to the Texas Supreme Court's decision in that case. That case recognized that Texas may allow recovery of interest based on an equitable doctrine, but also held that such interest is measured by the statutory rate.[3]

This Court recognized that Kansas law is not consistent with the laws of other states. The respondents here, and the Kansas court below, merely close their eyes to these conflicts, apply Kansas law as if it was consistent

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[2] Respondents' statement that "in *Sid Richardson Carbon & Gas Co. v. Phillips Pet[roleum Co.]*, 456 F.2d 203 ([5th Cir.] 1972), Phillips was ordered to pay interest on suspense royalties at FERC rates," Resp. Brief in Opposition, p. 9, is a complete fabrication. That case was a dispute between Phillips as seller, and Sid Richardson as purchaser, over the correct interpretation of a gas purchase contract. No "suspense royalties" were involved in that case. The Kansas Supreme Court did not even cite *Sid Richardson* in its decision.

[3] "Nonstatutory interest has been allowed most often under the name of 'damages,' measured by the legal rate of interest . . . ." 569 S.W.2d at 486. "The legal rate of interest is the safest criterion or standard of damages" in such cases." *Id., citing Close v. Fields*, 13 Tex. 623 (1855). "[T]he courts have, by analogy, adopted the legal rate of interest fixed by statute as the standard by which to be governed in assessing damages for the detention of money." *Id., quoting Watkins v. Junker*, 90 Tex. 584, 40 S.W. 11 (1897). Subsequent Texas cases have continued to limit equitable interest in contract cases to the statutory rate. *Missouri-Kansas-Texas Railroad Co. v. Fiberglass Insulators*, 707 S.W.2d 943 (Tex. App. 1986); *Baker Marine Corp. v. Weatherby Engineering Co.*, 710 S.W.2d 690 (Tex. App. 1986).

with the other states' laws and submit that this process is consistent with this Court's mandate. This evasion of the mandate cannot withstand this Court's scrutiny.

II. The Kansas Court Created Federal Common Law.

Respondents' attempt to disentangle the Kansas court's use of the FERC interest regulation from its holding under state laws does little more than support the fact that the Kansas Supreme Court created federal common law.[4] Respondents ignore the Kansas court's holding that abrogated "without interest" contracts[5] on the basis of what the Kansas court found to be a conflict with the federal regulation. Respondents justify the Kansas court's use of this regulation as Polaris, pointing the way for all states to impose interest at federal rates—notwithstanding different statutory rates or constitutional provisions—by fashioning a universal equitable principle that dictates uniform application of the FERC interest rate.

The respondents' creation of this universal equitable principle to justify the Kansas Supreme Court's holding is no less abhorrent to the Constitution than the Kansas

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[4] Phillips properly presented the "federal common law" question to the Kansas Supreme Court. Phillips, in its motion for rehearing, argued that the federal regulation did not support the imposition of interest at the federal rates; that the federal regulation could not be properly extended to include the royalty obligation; that the federal agency had no jurisdiction to create liability to royalty owners for interest; and that imposing interest liability at federal rates was inconsistent with congressional intent. Although Phillips did not use the expression "federal common law" below, the issue was presented thoroughly to that court.

[5] Phillips entered into "without interest" contracts with a number of producers. These contracts contained a contractual pricing term that required Phillips to pay a price for gas it took calculated upon approved filed rates. If and when any new rate was approved, the contract provided for a recomputation of the purchase price for the period in which Phillips collected unapproved rates and a payment of the recomputed price without interest.

court's creation of federal common law to justify the Kansas result reached below. Either by substituting the federal regulation for analysis of state law, as the court did below, or by expressly creating and applying a universal equitable notion, as advocated by the respondents, the policies of the other states were defeated and displaced by Kansas' notion of what the equitable result should be in this case.

Contrary to what respondents assert, however, there is no question but that the Kansas Supreme Court expressly relied upon the FERC regulation to displace the law of any state that would uphold "without interest" contracts. The Kansas Supreme Court's statement that the additional royalties "are thoroughly permeated with interest fixed by federal law in the FPC regulations . . . ," App. 50a, and that court's holding that those regulations set applicable interest rates, notwithstanding the differences in state law pointed out by Phillips, demonstrate that Kansas in fact did create federal common law. As shown in Phillips' petition, the creation of that law serves to defeat congressional goals and is an unwarranted judicial intrusion into areas that Congress believed would be better governed by regulatory agencies or left to individual state determinations.

III. The Respondents' Uniform Equitable Doctrine Offends Constitutional Protections.

Respondents repeatedly focus not on the law of the interested states, but rather upon their own and the Kansas Supreme Court's notions of "equity." Under the holding below as demonstrated in the respondents' brief, the most "equitable" rates are said to be those producing the highest yield for the royalty owners. Thus, Texas' application of the six percent statutory interest rate, rather than the higher federal rate, is labeled as incon-

sistent with "equitable" principles.[6] Viewed with the advocate's eye from the royalty owners' perspective, "the most equitable interest rate obviously is not the statutory rate." Resp. Brief, p. 8. Those statutory rates are "antique." Resp. Brief, p. 7. By assuming that the highest rate is the most "fair and equitable" rate, respondents are able to conclude that "the statutory rates, some of them enacted in the 1930's, would not be fair and equitable . . ." and that Kansas' choice of the FERC rates "can hardly be said to be 'arbitrary or fundamentally unfair.' . . ." Resp. Brief, pp. 21, 18. Anything that poses impediments to the royalty owners receiving the highest rate constitutes "defenses based on technicalities of laws of other states and alleged constitutional infirmities. . . ." Resp. Brief, p. 4. Respondents naturally agree with the Kansas District Court that the laws of other states that yield lower returns for royalty owners are "less logical [and] fair than the Kansas Supreme Court has been in the *Shutts* case." App. 59a.

Instead of arguing that the Kansas court attempted in good faith to determine and apply the substantive law of the interested states, the respondents argue that the Kansas application of "equitable principles" was of such transcendental fairness that the result should not be upset. Whether Kansas law has produced a result that the respondents, or even the Kansas courts, deem "fair" is beside the point.[7] The universal application of the Kansas

---

[6] The respondents refer to FERC rates of seven and nine percent. Resp. Brief, pp. 4, 8, 20. These figures do not accurately portray the impact that applying the FERC rate has in this litigation. Since October 1, 1979, the FERC rate has been adjusted quarterly and in one quarter even rose above 20 percent. Application of this rate will have a very significant impact on Phillips' liabilities.

[7] The quality of the Kansas judiciary is not at issue. As shown by this Court's reversal of the prior judgment in this case, the Kansas court is not infallible. Given the royalty-owner bias the Kansas court has displayed in the past, the respondents' flattering description of the "quality" of the Kansas judiciary is understandable.

notion of equity has acted to defeat countervailing policies of other states and has resulted in the exaction of interest at much higher rates than would have occurred under a proper application of other states' laws.

When this Court decided this case, it recognized that the constitutional protections of full faith and credit and due process prevent a defendant from being liable under the law of a state having no connection to a transaction. Yet, the process employed by the Kansas Supreme Court achieved exactly that unconstitutional result. Notwithstanding indistinguishable cases reaching contrary results in other states, the Kansas court universally reached the Kansas answer. Kansas' refusal to abide by the law of the interested states is "the very kind of parochial entrenchment on the interests of other states that it was the purpose of the Full Faith and Credit Clause and other provisions of Article IV of the Constitution to prevent." *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980) (plurality opinion).

Review should be granted so that the improper extension and misapplication of Kansas law be contained. The result reached below will not be limited to the 28,000 claims of class members in this case. It already has been relied upon in upholding the claims of 3,000 class members in *Wortman v. Sun Oil Co.*, 241 Kan. 226, 734 P.2d 1190 (1987). It undoubtedly will be relied upon to dispose of any other suspense royalty class action cases now pending in Kansas. The process employed by the Kansas Supreme Court to construe the laws of other states to be consistent with the law of Kansas—no matter what—will influence any action filed in Kansas that has a choice of law question. Allowing the decision of the court below to stand only can lead to increased interstate tension [8] and

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[8] Contrary to respondents' bald assertion that no forum shopping will result, the circumstances surrounding the present case certainly smack of forum shopping. This action had its genesis in an Oklahoma class action brought by Bill Ginder, the senior partner of

an escalation of the risks faced by any corporation that does business in, or is amenable to suit in Kansas.

The Kansas Supreme Court has elevated the rights of royalty owners—rights derived solely from private contracts—to a higher level than the constitutional rights of Phillips. The Kansas courts have coupled the nationwide class action device with a distortion of controlling law to defeat Phillips' rights to have its obligations to royalty owners determined by interested states' laws. Phillips' constitutional rights were recognized by this Court's previous opinion in this action. Ensuring that both these safeguards for the nationwide class action and Phillips' constitutional rights are respected requires this Court once again to review and reverse the decision of the Kansas Supreme Court. Unless this Court takes this occasion to remind states of their constitutional obligations to defendants, state courts desirous of propagating and extending certain local policies will be emboldened to play fast and loose with the limits theoretically imposed on them by the obligations of federalism.

Ed Moore, formerly one of plaintiffs' counsel. That case was dismissed after Phillips sought to disqualify Moore as plaintiff class counsel. Moore immediately filed another Oklahoma class action on behalf of Robert and Betty Anderson. That case was dismissed after the trial court sustained a demurrer to the petition. Immediately thereafter, Robert and Betty Anderson joined with Irl Shutts as plaintiffs in this Kansas action. Moore represented the Andersons through the decision below, but subsequently has withdrawn.

CONCLUSION

For the foregoing reasons, the Petition of Phillips for a Writ of Mandamus or a Writ of Certiorari should be granted.

Respectfully submitted,

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Date: October 6, 1987

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